ASIA PACIFIC PARCEL TANKERS PTE LTD

v.

THE OWNERS OF THE SHIP OR VESSEL "NORMAR SPLENDOUR"

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[ADMIRALTY IN REM NO: 27-17-1997]
14 SEPTEMBER 1999

CIVIL PROCEDURE: *Contempt of court - Arrest of vessel - Departure of vessel by master despite arrest - Whether defendant as owner of vessel in contempt of court - Whether defendant conspired with master or was privy to and assisted in vessel breaking arrest - Whether onus on plaintiff to prove - Whether proved beyond reasonable doubt - Whether extenuating circumstances compelled master to break arrest - Wrongful arrest of vessel - Whether breach thereof still constituted contempt - Whether fine imposed - Whether mitigating factors to reduce amount of fine*

SHIPPING: *Action in rem - Arrest of vessel - Arrest of vessel as security for award that might be made in arbitration - Whether arrest wrongful*

The plaintiff entered into a charterparty with the defendant to charter the vessel owned by the defendant. The plaintiff claimed that the vessel failed to perform according to the terms of the charterparty and so terminated the charter. The charterparty had a provision to refer disputes to arbitration. The plaintiff obtained a warrant to arrest the vessel at Pasir Gudang and claimed for damages against the defendant.

The defendant entered a conditional appearance and filed an application for a stay of proceedings and for the release of the vessel in encl. 24. Before encl. 24 could be heard, the master of the vessel sailed it out of Pasir Gudang on the ground that the sorry state of affairs on board the vessel compelled him to do so.

In this instance, the plaintiff applied for a declaration that the defendant was in contempt of court for removing the vessel from the court's jurisdiction and that as a consequence thereof the defendant's application in encl. 24 be dismissed with costs. Also that the defendant be precluded from taking any steps in these proceedings.

Held:

[1] The onus was on the plaintiff to prove that the defendant conspired with the master to commit the contemptuous act or that the defendant was privy to the act and assisted in the transaction. The plaintiff must prove beyond reasonable doubt.

[2] The steps taken by the defendant to secure for the release of the vessel after arrest were not consonant with the *mens rea* of someone planning for the vessel to break arrest. There was a reasonable doubt as to whether the defendant conspired with the master or was privy to and assisted in the vessel breaking arrest.

[3] A principal cannot be liable for the contemptuous act committed by his servant unless the principal knowingly assisted in the commission of the contemptuous act. For the defendant to be guilty of contempt of court committed by the master of the vessel, the plaintiff must prove that the defendant knowingly assisted in the vessel breaking arrest. No such evidence was adduced.

[4] The plaintiff relied on circumstantial evidence which did not reach the standard of proof of beyond reasonable doubt. Thus, there was no proof to show that the defendant conspired with the master of the vessel or was privy to and assisted in the vessel breaking arrest.

[5] The Malaysian court has the same jurisdiction and authority to matters of admiralty as the High Court of Justice in England under the United Kingdom Supreme Court Act 1981 [Courts of Judicature Act 1964]. A reading of ss. 20 to 24 of the Supreme Court Act 1981 shows that a vessel cannot be arrested as security for an award which may be made in an arbitration. If the court cannot maintain the arrest as security for arbitration, the vessel should not in the first place be arrested as security for satisfaction of an award that may be made in arbitration. However, if the owner of the vessel was financially unable to meet any award which may be made in arbitration, the court retained a discretion to maintain the arrest of the vessel. In the present case, this was not so. Thus, the plaintiff's arrest of the vessel was wrongful.

[6] The arrest of the vessel by the plaintiff was done without disclosing to the court that the charterparty had a provision to refer disputes to arbitration. This non-disclosure was material and, consequently, the entire proceedings could be described as vexatious and an abuse of the process of the court.

[7] The master's story was corroborated by an independent third party who actually witnessed the sorry state of affairs on board the vessel. The extenuating affairs on board the vessel was a mitigating factor to be considered.

[8] Disobedience to an improperly obtained court order will still constitute contempt and consequently, a party aggrieved by such an order should make the necessary application to the court for relief from complying with the order. However, the fact that the warrant of arrest was irregular and the present proceedings vexatious and an abuse of process of court were mitigating factors in favour of the defendant.

[9] There was no contumacious conduct nor was there a deliberate breach of an order for personal profit or gain and these factors must be reflected in the amount of fine imposed. The extenuating circumstances on board the vessel also operated to reduce the amount of fine imposed.

[Application dismissed; fine of RM2,150 to be paid by defendant.]

Case(s) referred to:

A Kahar Bador v. N Krishnan [1983] 1 MLJ 412 ***(refd)***
Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***
Anthony Ratos Domingos Ratos v. City Specialist Centre Sdn Bhd (t/a City Medical Centre) (Attorney General, Intervener) [1996] 3 MLJ 349 ***(refd)***
Attorney-General v. Times Newspapers Ltd [1992] 1 AC 191 ***(refd)***
Bakshish Singh v. The State of Punjab AIR [1971] SC 2016 ***(refd)***
Bowles v. Bank of England [1913] 1 Ch 57 ***(refd)***
Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No 2) [1975] 48 DLR (3d) 641 ***(refd)***
Chung Onn v. Wee Tian Peng [1996] 5 MLJ 521 ***(refd)***
Compania Maritima San Basilio SA v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes [1976] 3 All ER 243 ***(refd)***
Concord Line Co Ltd v. The Owners Of The Ship "Molly" [1997] 4 CLJ Supp 285
Cooper v. Wilson [1937] 2 KB 309 ***(refd)***
Crown Zellerbach Canada Ltd v. Annand [1972] 27 DLR (3d) 129 ***(refd)***
Cullimore v. Lyme Regis Cpn [1962] 1 QB 718 ***(refd)***
Dato' Menteri Othman Baginda v. Dato Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***
Datuk Syed Kechik Syed Mohamed v. Government Of Malaysia & Anor [1979] 2 MLJ 101 ***(refd)***
Drewry v. Thacker [1819] 3 Swans 528 ***(refd)***
Dyson v. AG [1912] 1 Ch 159 ***(refd)***
Elsdon v. Hampstead Borough Council [1905] 2 Ch 633 ***(refd)***
Eshah Sa'at v. Meriam Sa'at [1975] 2 MLJ 97 ***(refd)***
Francis v. Municipal Councillors of Kuala Lumpur [1962] MLJ 407 ***(refd)***

Francis v. Yiewsley & West Drayton Urban District Council [1958] 1 QB 478 ***(refd)***
Gateshead Union Guardians v. Durham CC [1918] 1 Ch 146 ***(refd)***
Goad v. Amalgamated Union of Engineering Workers (Engineering Section) [1972] ICR 429 ***(refd)***
Gray v. Spyer [1922] 2 Ch D 22 ***(refd)***
Hadkinson v. Hadkinson [1952] All ER 567 ***(refd)***
Harrison v. Croydon London Borough Council [1968] Ch 479 ***(refd)***
Heatons Transport (St Helens) Ltd v. Transport and General Workers' Union [1973] AC 15 ***(refd)***
Huggins [1730] 2 Stra 883 ***(refd)***
Ibeneweka v. Egbuna [1964] 1 WLR 219 ***(refd)***
In re Bramblevale Ltd [1970] Ch 128 ***(refd)***
Jennison And Others v. Baker [1972] 2 QB 52 ***(refd)***
Johnson v. Walton [1990] 1 FLR 350 ***(refd)***
Karpal Singh v. Sultan of Selangor [1988] 1 MLJ 64 ***(refd)***
Knight v. Clifton [1971] Ch 700 ***(refd)***
Kuluwante v. Government of Malaysia [1978] 1 MLJ 92 ***(refd)***
Lee Yu Fah & Ors v. PP [1937] MLJ Rep 171 ***(refd)***
Lord Wellesley v. The Earl of Mornington [1848] 11 Beav 786 ***(refd)***
MBf Holdings Bhd & Anor v. Houng Hai Kong & Ors [1995] 1 MLJ 135 ***(refd)***
Merdeka University Bhd v. Government of Malaysia [1981] 2 MLJ 356 ***(refd)***
Miller v. Scorey [1996] 1 WLR 1122 ***(refd)***
Ng Hee Thoong v. Public Bank Berhad [1995] 1 MLJ 281 ***(refd)***
North Eastern Marine Engineering Company v. Leeds Forge Company [1905] 1 Ch D 324 ***(refd)***
Northwest Territories Public Service Association v. Comr of the Northwest Territories [1980] 107 DLR (3d) 458 ***(refd)***
Re Agreement Of The Mileage Conference Group Of The Tyre Manufacturers' Conference, Ltd [1966] 2 All ER 849 ***(refd)***
Re Barnato [1943] Ch 258 ***(refd)***
Re H's Settlement, H v. H [1909] 2 Ch 260 ***(refd)***
Re M [1994] 1 AC 377 ***(refd)***
Re Mileage Conference Group of the Tyre Manufacturer's Conference Ltd's Agreement [1966] 1 WLR 1137 ***(refd)***
Re Kerly Son & Verden [1901] 1 Ch 467 ***(refd)***
Re Regina and Monette [1975] 64 DLR (3d) 470 ***(refd)***
Re Sheppard and Sheppard [1976] 67 DLR (3d) 592 ***(refd)***
Re Supply of Ready Mixed Concrete (No 2) Director General of Fair Trading v. Pioneer Concrete (UK) Ltd and Another [1995] 1 All ER 135 ***(refd)***
Ridge v. Baldwin [1964] AC 40 ***(refd)***
Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd [1921] 2 AC 438 ***(refd)***
Stancomb v. Trowbridge Urban District Council [1910] 2 Ch D 190 ***(refd)***
Scott (Otherwise Morgan) And Another v. Scott [1913] AC 417 ***(refd)***
SI Rajah v. Dato' Mak Hon Kam [1993] 3 MLJ 741 ***(refd)***
Sungai Wangi Estate v. UNI [1975] 1 MLJ 136 ***(refd)***
The Abodi Mendi [1938] Probate Division 178 ***(refd)***

The "Beauty Orchid II" [1977] 2 MLJ 83 ***(refd)***
The Bure [1850] 14 Jurist 1123 ***(refd)***
The "Cap Bon" [1967] 1 Lloyd's List Law Reports 543 ***(refd)***
The "Dong Moon" [1979] 1 MLJ 152 ***(refd)***
The "Golden Trader" [1974] 1 Lloyds Report 383 ***(refd)***
The Hoop [1801] 4 C Rob 145 ***(refd)***
The Jarlinn [1965] 3 All ER 36 ***(refd)***
The Merdeka [1982] 1 Lloyd's Law Reports 401 ***(refd)***
The "Petrel" [1836] 3 Hag Adm 299 ***(refd)***
The "Rena K" [1978] 1 Lloyd's Law Reports 545 ***(refd)***
The Seraglio [1885] 10 Probate Division 120 ***(refd)***
The "Vasso" (formerly "Andria") [1984] 1 Lloyd's Law Reports 235 ***(refd)***
Vine v. National Dock Labour Board [1957] AC 488 ***(refd)***

Legislation referred to:
Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, ss. 2(1), 6(1), (3)
Courts of Judicature Act 1964, s. 24(b)
Co-operative Societies Ordinance 1948, s. 49(1)(a)
Federal Constitution, art. 42(8)
Rules of the High Court 1980, O. 15 r. 16
Specific Relief Act 1950, s. 41

Arbitration Act 1975 [UK], s. 1(1)
Civil Jurisdiction and Judgment Act 1982 [UK], s. 26(1)
Supreme Court Act 1981 [UK], ss. 20, 21, 22, 23, 24

Other source(s) referred to:
Beyond Reasonable Doubt - The Golden Thread Weakened?, Clarence Edwin [1998] 1 CLJ i
Criminal Law, JC Smith and Brian Hogan, 6th edn, pp 162, 163, 164
Mallal's Digest of Malaysian and Singapore Case Law, 1998 reissue, 4th edn, vol 2(1)
The Law of Contempt, Nigel Lowe and Brenda Sufrin, 3th edn, pp 570, 571

For the plaintiff - Jainil Bhandari; M/s KM Chye & Partners
For the defendant - Clarence Edwin; M/s Abdul Raman Saad & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Background

Three applications were pending before this court, namely:

(a) the defendant's application in encl. 24 for a stay of proceedings;

(b) the plaintiff's application for judgment in default in encl. 30; and

(c) the present application by the plaintiff for contempt of court in encl. 41.

This judgment focussed itself on encl. 41 where the plaintiff sought for the following prayers:

(1) A declaration that the defendant are in contempt of this Honourable Court by removing or causing to be removed or allowing or otherwise permitting the vessel "NORMAR SPLENDOUR" to sail away from the jurisdiction of this Honourable Court whilst she was lying under arrest by virtue of a Warrant of Arrest issued on 13 November 1997 by this Honourable Court.

(2) That ancillary to or as a consequence of the Order made in paragraph (1) above:

(a) The defendant's application filed herein on December 6, 1997 (enclosure 24) be dismissed with costs; and

(b) The defendant be precluded from taking any further steps and from filing any affidavits in the proceedings herein.

(3) That the defendant do pay the plaintiff the costs of and incidental to this application.

(4) Such further or other relief as this Honourable Court deems fit.

The plaintiff's application in encl. 41 was supported by an affidavit in encl. 40 of Cheok Hoon Thiam, a Singaporean, that was affirmed on 11 November 1998 and filed on 13 November 1998. Ole Zimmermann Borresen of Oslo, Norway affirmed an affidavit on 15 December 1998 which was filed on 30 December 1998 and marked as encl. 47 and this served as a reply to enclosure 40. Cheok Hoon Thiam responded and he deposed an affidavit in encl. 52 on 25 March 1999 which was filed on 26 March 1999 and this served as a reply to encl. 47. Two other pertinent affidavits must be considered in adjudicating encl. 41. That would be the affidavit of the bailiff in encl. 54 and the affidavit of Captain Datuk Hamzah bin Mohd Noor in encl. 53.

Prayer 2 (a) of encl. 41 sought for the dismissal of encl. 24 with costs and encl. 24 was the defendant's application for a stay of proceedings, of which I have more to say in the later part of this judgment.

The Honourable Chief Judge of Malaya, YAA Tan Sri Dato' Wan Adnan bin Ismail, by letter dated 10 May 1999 directed that this case be dealt by me notwithstanding the fact that this was a file of another judge in Johor Bahru and so I forthwith dealt with encl. 41.

Facts Of The Case

The defendant is the owner of the ship or vessel known as "Normar Splendour." A warrant of arrest was issued by the Johor Bahru High Court against Normar Splendour on 13 November 1997 and that warrant of arrest was effected by the plaintiff at the port of Pasir Gudang, Johor Bahru on 16 November 1997. The writ of summons was also served on Normar Splendour on 16 November 1997. The defendant swiftly instructed Messrs Skrine & Co, the defendant's first solicitors, to act on the defendant's behalf in this matter and the defendant, through their solicitors, entered a conditional appearance to the action on 24 November 1997. On 6 December 1997, the defendant filed encl. 24 supported by an affidavit in encl. 23 for, *inter alia*, an order that the plaintiff's action be stayed and that Normar Splendour be released from arrest. Enclosure 24 was fixed for hearing before another judge of the High Court Johor Bahru on 14 January 1998 but somehow it was adjourned. Sometime in February 1998, Normar Splendour sailed from the Pasir Gudang port in breach of the warrant of arrest. The defendant was informed that Normar Splendour broke arrest, and this was a few days after the event when the master of the vessel contacted the defendant's office at Dubai. Ole Zimmermann Borresen in his affidavit in encl. 44 at para. 4 was emphatic and apologetic when he deposed as follows:

> On behalf of the defendants, I apologise to this Honourable Court for the vessel breaking arrest in Pasir Gudang, Johor, Malaysia sometime in January 1998. The circumstances leading to such event took the defendants by surprise and I was only aware of the matter after the master of the vessel informed the Dubai office of the defendants about it a few days after he had done so. The defendants have since laid off the master and the entire crew and each of them are no longer in the employment of the defendants.

Ole Zimmermann Borresen made inquiries of his own in regard to the breaking of arrest of Normar Splendour, and this was what he deposed in encl. 44:

> 5. I have since conducted my inquiries into the incident and found out the Master decided to act in his own capacity without referring to the Defendants at all. The circumstances of the arrest and events that followed prompted the Master to act as such.
>
> 6. After 8 weeks into the arrest of the vessel, the Master of the vessel was getting extremely worried about the conditions on board the vessel. The vessel was anchored at the outer anchorage of Pasir Gudang. No representatives from the authorities paid a visit to the vessel for over 2 months after she was arrested. Furthermore, no one else was allowed to go on board the vessel during this period. The vessel was without proper water and food supplies.

7. The Master has reported that similar circumstances also existed on board a neighbour ship under arrest. In that case (according to the feedback from the Master), it was claimed that master of the arrested vessel was killed by the crew. Furthermore, tension was building up on board the present vessel and according to reports from the Master, the crew was close to taking the law into their own hands. In view of this, the Master apparently saw no alternative but to leave Pasir Gudang in order to calm the crew and in order to get supplies for the vessel and thereby safeguard the vessel and the crew. This was done without authorisation from the Defendants and was purely motivated by the Master's own judgment in the prevailing circumstances then.

8. The Defendants had also engaged Regship Services Sdn Bhd, a Malaysian shipping agent company. Datuk Captain Hamzah bin Mohd Noor, the managing director of Regship Services Sdn Bhd, personally visited the vessel and interviewed the Master and the crew. It was through Datuk Captain Hamzah's good relationship with the port authorities (he having worked with them before) that he managed to gain access to the vessel. Marked hereto as "OZB-I" is a copy of Regship Services Sdn Bhd's report dated 10.01.1998. ...

9. I am saddened by the turn of events as the Defendant's priority was to get the arrest lifted and proceedings stayed pending arbitration. The events on board the vessel superceded the court hearing dates and as soon as we learnt about the matter, we reported to our Norwegian solicitors in early February 1998 who in turn reported to Skrine & Co, the then Malaysian solicitors for the Defendants. Both firm of solicitors have discharged themselves from acting for the Defendants immediately thereafter. Since then there have been a state of miscommunication regarding the status of the present case for which we were looking for suitable Malaysian lawfirms to handle our case until we formally instructed Abdul Raman Saad & Associates to represent us now.

and it can be surmised that the defendant had informed their first solicitors – Messrs Skrine & Co, about Normar Splendour breaking arrest in the hope that something would have been done by them to placate the situation. The Norwegian solicitors too were informed but unfortunately both firms of solicitors have discharged themselves from acting for the defendant immediately thereafter. The defendant, being a foreigner, was naturally at a loss and they did not know as to how to proceed with the case. The defendant was informed sometime in August 1998 (the exact date could not be ascertained) that the plaintiff had filed an application for judgment in default in encl. 30. It was at this time, that the defendant was racing against time to engage and appoint a new firm of solicitors. At para. 16 of encl. 51, Ole Zimmermann Borresen deposed as follows:

16. As regards para 20 of Cheok's Affidavit, after the vessel broke arrest and Malaysian lawyers discharged themselves, everything was silent until a default judgment by the Plaintiffs was applied for. The application was only notified to the Defendants to our technical department in Bombay. The Defendants only knew about the default judgment application sometime in August 1998. That was the first time since the discharge of Skrine & Co that we learnt of a new hearing date for the case. We were rushed to appoint a Malaysian lawyer to handle the case for us. After the discharge of Skrine & Co and Evensen & Co (the Norwegian lawyers), the Defendants were at a loss as to how to proceed with the case. We did not immediately engage a Malaysian lawyer to handle the case and perhaps did not appreciate the seriousness. We apologise to this Honourable Court for our mistakes here.

and he was indeed full of apology. Messrs Saga Raja & Kumar was then instructed to handle the matter at hand but they too were subsequently replaced by the present solicitors – the renowed law firm of Messrs Abdul Raman Saad & Associates of Johor Bahru. In paras. 10 and 11 of encl. 44, Ole Zimmermann Borresen deposed as follows:

10. The Defendants had no intention of breaking the law of Malaysia or of any court order granted by this Honourable Court. It was unfortunate that the relevant authorities could not have alleviated the situation on board the vessel. When the situation on board the vessel deteriorated, the Master decided to take things in his own hands and decided to break arrest for the overall well-being of the crew and the vessel.

11. To my knowledge, where a vessel is arrested in many jurisdictions, the arresting party and the arresting authority also had the duty (in addition to the owner's duty) to see that the welfare of the crew and of the vessel are taken care of pending disposal of the case. From my knowledge, in most jurisdictions, the relevant authorities always require the arresting party to put up suitable arrangements or security to ensure that the welfare of the vessel and crew were attended to. This included adequate supply of fresh water and food, fuel for their generators and so forth. In both instances, neither the Plaintiffs nor the relevant authorities in the present case attended to any such needs of the crew and vessel for a period of more than 8 weeks. It was not done in the present case which I think the Plaintiff has a duty whether legally or on humanitarian grounds to attend to the needs of the vessel and the crew.

and these assertions gave an insight as to the situation on board Normar Splendour at the material time.

Mr. Clarence Edwin, learned counsel for the defendant, argued that the prayers sought for in encl. 41 were draconian and if granted would effectually shut out the defendant. Of pertinence to note would be the fact that encl. 41 did

not seek for an order that the contemnor purge the contempt but rather that the defendant's application for stay in encl. 24 be dismissed with costs and that the defendant be barred from defending the application for judgment in default filed by the plaintiff in encl. 30. A germane observation must be made here. The plaintiff did not say in so many words that the plaintiff should be allowed to enter judgment against the defendant on the ground that a contempt had been committed. But the effect of prayer 2 (b) of encl. 41 was for that very purpose. Once the defendant has been shut out from these proceedings, the plaintiff can proceed to obtain judgment.

Declaration

That this court has the jurisdiction to grant the declaratory reliefs as sought for by the plaintiff in encl. 41 is beyond doubt. Joyce J in *North Eastern Marine Engineering Company v. Leeds Forge Company* [1905] 1 Ch.D 324, sets out the power of the court to grant declaration in these words (at p. 328 to p. 329 of the report):

> The old rule as to an action for a declaration was that such an action could not be maintained unless the plaintiff would be entitled to some consequential relief, whether he asked for it or not. Order xxv, r. 5, of the Rules of the Supreme Court 1883, introduced a new rule, which provides that 'no action or proceeding shall be open to objection, on the ground that is merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed, or not.' To the operation of that rule there must, however, be some limitation. It cannot, I think, compel the court to entertain any and every action for a declaration, and it cannot be that a claim for any declaration whatsoever it may be is a good ground of action. What the limitation is I am not prepared to say, and I am not going to attempt to define it. There is an *obiter dictum* of the present Master of the Rolls in *Williams v. North's Navigation Collieries [1889], Ld.* [1904] 2 KB 44, that the declaration claimed must be ancillary to putting in suit some legal right. Whether this be as plain and satisfactory a definition as could be wished I venture to doubt, but both sides agreed in saying that it was a matter for my discretion, a discretion which if it exists, according to the cases, must be exercised with extreme care and caution.

Lord Sterndale MR in crystal clear words said in *Gray v. Spyer* [1922] 2 Ch.D 22, 27:

> The learned judge doubted if this was a proper case for a declaration with no consequential relief. I agree with him that claims for declaration should be carefully watched. Properly used, they are very useful; improperly used, they almost amount to a nuisance.

In essence, a declaratory judgment merely states the rights or legal position of the parties as they stand, without changing them in any way. It is a valuable remedy for settling disputes before they reach the point where a right is infringed. It is a discretionary remedy. And the court is always wary and would be alert to prevent its abuse. So the courts have refused reliefs to speculators and busybodies and to those people who ask hypothetical questions (*Re Barnato* [1943] Ch 258; and *Harrison v. Croydon London Borough Council* [1968] Ch 479). Even those who have no sufficient interest would be denied relief. As Lord Dunedin said in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd* [1921] 2 AC 438 at 448:

> The question must be real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, some one presently existing who has a true interest to oppose the declaration sought.

But declarations have been freely given by the courts in these situations:

(i) where the guardian of a child may obtain a declaration against a county council that wrongly refused to accept children in its schools (*Gateshead Union Guardians v. Durham CC* [1918] 1 Ch. 146);

(ii) where a police officer seeks to obtain a declaration that he has not been properly and validly dismissed (*Cooper v. Wilson* [1937] 2 KB 309; and *Ridge v. Baldwin* [1964] AC 40);

(iii) where a dock worker seeks a declaration to the effect that he has been wrongfully removed from the register and so preserving his right to employment under the dock labour scheme (*Vine v. National Dock Labour Board* [1957] AC 488);

(iv) where there was an unlawful tax demand (*Bowles v. Bank of England* [1913] 1 Ch. 57; and *Dyson v. AG* [1912] 1 Ch 159);

(v) in a situation where there were street works charges (*Elsdon v. Hampstead Borough Council* [1905] 2 Ch 633);

(vi) in regard to coast protection charges (*Cullimore v. Lyme Regis Cpn* [1962] 1 QB 718); and

(vii) in regard to enforcement notices (*Francis v. Yiewsley & West Drayton Urban District Council* [1958] 1 QB 478).

A declaratory order has no coercive force at all. But it is useful and the usefulness of a declaration would be dependent on the assumption that the public authority will not disobey the law once it is discovered what the law is. Declaration is a flexible remedy and it can be used in a "wide range of

circumstances" and "a wide variety of cases in terms of subject matter" (*Dato' Menteri Othman bin Baginda v. Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, 31). Section 41 of the Specific Relief Act 1950 (Act 137) (Revised - 1974) is the governing provision for a declaratory decree. It enacts as follows:

> Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.
>
> Explanation - A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.
>
> ILLUSTRATIONS
>
> (a) A bequeaths his property to B, C and D, 'to be equally divided amongst all and each of them, if living at the time of my death, then amongst their surviving children.' No such children are in existence. In a suit against A's executor, the court may declare whether B, C and D took the property absolutely, or only for their lives, and it may also declare the interests of the children before their rights are vested.
>
> (b) A covenants that, if he should at any time be entitled to property exceeding $100,000.00, he will settle it upon certain trusts. Before any such property accrues, or any persons entitled under the trusts are ascertained, he institutes a suit to obtain a declaration that the covenant is void for uncertainty. The court may make the declaration.
>
> (c) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.
>
> (d) A bequeaths property to B for his life, with remainder to B's wife and her children, if any, by B, but, if B die without any wife or children to C, B has a putative wife, D, and children, but C denies that B and D were ever lawfully married; D and her children may, in B's lifetime, institute a suit against C and obtain therein a declaration that they are truly the wife and children of B.

and, in my opinion, it is not that exhaustive as it does not cover every kind of declaratory relief. A wider and broader power to issue declaration is provided under O. 15 r. 16 of the Rules of the High Court 1980 which states as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

and Abdoolcader J in *Sungai Wangi Estate v. UNI* [1975] 1 MLJ 136 described this rule as having "the widest application as it provides that where a declaration is asked for, it may not be objected to on the ground that no consequential relief is or could be claimed. It does not prescribe any special procedure, nor is it limited to any specific matter. It applies to all proceedings for a declaration." Lee Hun Hoe CJ Borneo in the *Kechik's* case *(Datuk Syed Kechik bin Syed Mohamed v. Government Of Malaysia & Anor)* [1979] 2 MLJ 101 at 107 said succinctly:

> In granting a declaration the court has to consider the utility of the declaration claimed and the usefulness of the declaration on the one hand as against the inconvenience and embarrassment that may result on the other hand.

Our courts have refused to grant declaratory reliefs in a number of cases. Some of these cases will now be referred to:

(i) *Eshah bte Sa'at v. Meriam bte Sa'at* [1975] 2 MLJ 97, was a case where the High Court refused to grant a declaration sought for by the plaintiff in regard to the decision of the Collector of Land Revenue because the High Court was of the view that the plaintiff could have appealed against the decision of the Collector of Land Revenue and the High Court too was of the view that the plaintiff did not apply for *certiorari* to quash the Collector of Land Revenue's order for lack of jurisdiction or for failure of natural justice.

(ii) *Merdeka University Bhd v. Government of Malaysia* [1981] 2 MLJ 356, [1982] 2 MLJ 243 was a case where the government of the day rejected an application to set up a private university and this outright rejection was challenged in court as null and void. The court was very bold and stern. It ruled in strong terms, rightly so, that the government had acted fairly and reasonably.

(iii) *Francis v. Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 was a case where a permanent employee was dismissed by the Kuala Lumpur municipal council and although the Privy Council agreed that the dismissal was irregular and wrongful because of the failure to observe the statutory technical requirement, yet the Privy Council refused to hold that the dismissal was *ultra vires* and the Privy Council too refused to grant a declaratory order sought by the permanent employee for re-instatement. The Privy Council was of the view that the permanent employee was only entitled to damages.

(iv) *Karpal Singh v. Sultan of Selangor* [1988] 1 MLJ 64 was a case where the Sultan of Selangor was alleged to have said in the newspaper report that he would not grant clemency to a convicted drug trafficker. Karpal Singh sought a declaration that dismissing a petition for clemency arbitrarily irrespective of the recommendation of the Pardons Board violated Art. 42 (8) of the Federal Constitution. The High Court refused to grant the declaration sought for and ruled, *inter alia*, that the declaration that was sought for related to future and theoretical issues and was consequently frivolous and vexatious and an abuse of the process of the court.

(v) *A. Kahar Bador v. N. Krishnan* [1983] 1 MLJ 412, 414, was a case where the High Court refused to issue a declaration in matters covered by s. 49(1)(a) of the Co-operative Societies Ordinance 1948 without exhaustion of the remedy provided thereunder, *viz* by referring the dispute to the Registrar - General for decision.

(vi) *SI Rajah v. Dato' Mak Hon Kam* [1993] 3 MLJ 741 was a case where a declaration was refused on the ground that the Registrar of Societies under the Societies Act 1966 had the full power to deal with matters concerning the administration and function of societies generally.

(vii) *Kuluwante v. Government of Malaysia* [1978] 1 MLJ 92, the court refused to grant the declaration sought for as it was said to be hypothetical and premature since the plaintiff did not avail herself to the remedy of appealing to the Minister before referring the matter to the court.

All said and done, the discretion was entirely mine to decide whether to grant the declaratory reliefs sought for by the plaintiff in encl. 41 or to reject it outright. As Lord Radcliffe said in *Ibeneweka v. Egbuna* [1964] 1 WLR 219:

> .... the power of the court to make a declaration, where it is a question of defining the rights of two parties, is almost unlimited; I might say only limited by its own discretion. The discretion should, of course, be exercised judicially, but it seems to me that the discretion is very wide.

Was The Breaking Of Arrest By Normar Splendour An Act Of Contempt? Who Was In Contempt?

Mr. Jainil Bhandari, learned counsel for the plaintiff, submitted that the defendant was in contempt by removing or causing to be removed or allowing or otherwise permitting Normar Splendour to sail away from the jurisdiction of this court in breach of the warrant of arrest dated 13 November 1997. He submitted that the removal of Normar Splendour amounted to not only an interference with an order of the court but also to put to naught the sheriff's

custody of the vessel in question. It was ingeniously argued that all the parties who actually carried off Normar Splendour from the Pasir Gudang port as well as those who were privy to and assisted in the scheme were said to be in contempt. Indeed, that was an all encompassing submission. The magnitude of breaking arrest as an act of contempt was lucidly described by Sir John Nicholl in *The "Petrel"* [1836] 3 Hag Adm 299 at 301:

> This vessel, while in the legal possession of this Court, was forcibly carried off in the night from Shoreham harbour to Jersey; and, under the suggestion of a debt due from the master, was there sold by an order of the Court of Jersey. An attachment has been decreed by this Court against the master and the mate; and in answer to a monition against other parties as privy to the fraud of carrying off this vessel, affidavits of Matthew Russell the elder and the younger have been brought in; and the question is, whether they have purged themselves of a contempt of the process of this Court. They are charged with an offence of great enormity – a great breach of the law, and a great violation of the rights of property, a species of theft and piracy. All parties who conspired to effect this violence are guilty of contempt; it is not confined to those who actually carried off the vessel, but it includes all who were privy to and assisted in the transaction.

The case of *The Hoop* [1801] 4 C Rob 145 lays down the following proposition of law: that from the moment the res is arrested the Marshall is responsible for its custody and any interference with it may be a contempt. It seems clear that any interference with a ship under arrest may be punished as contempt of court. Factually, there was no dispute at all that Normar Splendour was removed from the jurisdiction of this court in breach of the warrant of arrest and so, according to Mr. Jainil Bhandari, the defendant was clearly in contempt of court.

Mr. Clarence Edwin, always quick on the uptake, made a crucial submission which clearly showed that the master of Normar Splendour was the guilty party. His stand was that, at the outset, the defendant did not dispute that a contempt of court had in fact been committed by the master of Normar Splendour and the defendant was apologetic and deeply regretted that the vessel in question had sailed in breach of a warrant of arrest emanating from the High Court at Johor Bahru. But the defendant through Mr. Clarence Edwin took exception to the plaintiff's allegation that the defendant had some hand in Normar Splendour breaking arrest. The defendant too took exception to the innuendos in the plaintiff's affidavits which gave the impression that it was the defendant who had instructed the master of Normar Splendour to sail away from Pasir Gudang port in breach of the warrant of arrest.

The law of contempt in Malaysia has not been codified. It is an interesting branch of the law. Contempt of court may be divided into two categories. The first would be criminal contempt – consisting of words or acts obstructing or

tending to obstruct or interfere with the administration of justice. The second would be civil contempt and this would relate to disobedience to judgments, orders or other processes of the court. It is meaningless to have two categories of contempt since the party alleging that a contempt has been committed is required to prove it to the same exacting standards as in criminal cases. Salmon LJ in *Jennison And Others v. Baker* [1972] 2 QB 52 CA at p. 61 of the report observed as follows:

> The inherent power of the judges of the High Court to commit for contempt of court has existed from time immemorial. 'Contempt of Court' is an unfortunate and misleading phrase. It suggests that it exists to protect the dignity of the judges. Nothing could be further from the truth. The power exists to ensure that justice shall be done. And solely to this end, it prohibits acts and words tending to obstruct the administration of justice. The public at large no less than the individual litigant have an interest and a very real interest in justice being effectively administered. Unless it is so administered, the rights, and indeed the liberty, of the individual will perish. Contempt of court may take many forms. It may consist of what is somewhat archaically called contempt in the face of the court, for example, by disrupting the proceedings of a court in session or by improperly refusing to answer questions when giving evidence. It may, in a criminal case, consist of prejudicing a fair trial by publishing material likely to influence a jury. It may, as in the present case, consist of refusing to obey an order of the court. These are only a few of the many examples that could be given of contempt. Contempts have sometimes been classified as criminal and civil contempts. I think that, at any rate today, this is an unhelpful and almost meaningless classification.

The same point was ventilated by Lord Oliver in *Attorney-General v. Times Newspapers Ltd* [1992] 1 AC 191, 217-218:

> A distinction (which has been variously described as 'unhelpful' or 'largely meaningless') is sometimes drawn between what is described as 'civil contempt,' that is to say, contempt by a party to proceedings in a matter of procedure, and 'criminal contempt'. One particular form of contempt by a party to proceedings is that constituted by an intentional act which is in breach of the order of a competent court. Where this occurs as a result of the act of a party who is bound by the order or of others acting at his direction or on his instigation, it constituted a civil contempt by him which is punishable by the court at the instance of the party for whose benefit the order was made and which can be waived by him. The intention with which the act was done will, of course, be of the highest relevance in the determination of the penalty (if any) to be imposed by the court, but the liability here is a strict one in the sense that all that requires to be proved is service of the order and the subsequent doing by the party bound not by the party bound of that which is prohibited. When, however, the prohibited act is done not by the party bound himself but by a third party, a stranger to the litigation, that person may also be liable for contempt. There is, however, this essential distinction that his

> liability is for criminal contempt and arises not because the contemnor is himself affected by the prohibition contained in the order but because his act constitutes a wilful interference with the administration of justice by the court in the proceedings in which the order was made. Here the liability is not strict in the sense referred to, for there has to be shown not only knowledge of the order but an intention to interfere with or impede the administration of justice – an intention which can of course be inferred from the circumstances.

and this passage was also followed by Lord Woolf in *Re M* [1994]1 AC 377, 427. I have more to say in regard to the standard of proof in contempt cases in the later part of this judgment.

Since time immemorial, the courts have an inherent jurisdiction to punish criminal contempt by adopting the summary process of committal. But this arbitrary and unlimited power must be exercised with utmost care and caution.

The present case was undoubtedly a case of civil contempt. It was disobedience on the part of the master when Normar Splendour broke arrest and fled from jurisdiction. Mr. Jainil Bhandari relied on the passages in the judgment of Sir John Nicholl in *The "Petrel" [supra]* as reproduced earlier to drive home the point that all parties who conspired were guilty of contempt and it was not confined to those who actually carried off Normar Splendour but it extended and included all those who were privy to and assisted in the transaction. Mr. Jainil Bhandari further submitted that even if the master of Normar Splendour had acted on his own when the vessel broke arrest, this was said to be an irrelevant consideration and the defendant was said to be bound by the actions of the master as the defendant was the master's employer. But Mr. Clarence Edwin took exception to this submission and he said that the proposition advanced by Mr. Jainil Bhandari flew in the face of the speech of Sir John Nicholl in *The "Petrel" [supra]*. An argument was advanced to the effect that the speech of Sir John Nicholl in the *"Petrel" [supra]* brought to the fore the principle that a contempt of this nature was confined to the person who actually carried off the vessel Normar Splendour, and in this case it was the master, unless there was conspiracy to commit the contempt or others were privy to the contemptuous act and assisted in it. In short, the brunt of Mr. Clarence Edwin's submission was this: that the plaintiff had to prove that the defendant knowingly assisted in the breach. In my judgment, for the defendant to be guilty of the contempt committed by the master of Normar Splendour, the plaintiff must prove that the defendant conspired with the master to commit the contemptuous act or that the defendant was privy to the act and assisted in the transaction. The onus was certainly on the plaintiff to prove that any one of these circumstances existed and the burden was onerous. The plaintiff can only discharge that burden by proof beyond a reasonable doubt: *affirmanti non neganti incumbit probatio* (the burden of proof is on the person who alleges, and not on the person who denies). I have, in the early part of

this judgment, adverted to what the defendant had to say in regard to the vessel Normar Splendour breaking the arrest by reproducing paras. 5, 6, 7, 8 and 9 of the affidavit of Ole Zimmerman Borresen in encl. 44. Earlier on at para. 4 of encl. 44, Ole Zimmerman Borresen had this to say:

> On behalf of the Defendant, I apologise to this Honourable Court for the vessel breaking arrest in Pasir Gudang, Johor, Malaysia sometime in January 1998. The circumstances leading to such event took the Defendants by surprise and I was only aware of the matter after the Master of the vessel informed the Dubai office of the Defendants about it a few days after he has done so. The Defendants have since laid off the Master and the entire crew and each of them are no longer in the employment of the Defendants.

All these paragraphs in encl. 44, clearly showed that the defendant had no knowledge whatsoever about Normar Splendour breaking arrest until a few days after that fateful day. The defendant too deposed through Ole Zimmerman Borresen that they played no part whatsoever in the breaking of arrest of Normar Splendour. Now, the crucial question to pose would be: Whether the plaintiff had produced any concrete evidence to show that the defendant had conspired with the master of Normar Splendour to break the arrest or whether the defendant was privy to and assisted in the vessel breaking arrest. Mr. Jainil Bhandari submitted that the master's act in breaking arrest could only have been made upon the instructions and/or with the knowledge and/or approval and/or authority of the defendant for the following reasons:

(a) It was inconceivable that the master of Normar Splendour would take such drastic action without consulting the defendant who was the employer. Normar Splendour broke arrest in the early part of February 1998.

(b) Throughout the entire month of January 1998, the master of Normar Splendour was in constant communications with Normar Mumbai and Normar Marine LCC who were the defendant's agents in Mumbai and Dubai respectively as reflected in exh. "CHT-2" in encl. 52.

(c) In January 1998, Normar Splendour sent 36 telexes to telex no: 76233 (Normar Mumbai) and 33 telexes to telex no: 48570 (Normar Marine LCC, Dubai) and this can be seen in encl. 52 at exhs. "CHT-2" and "CHT-3".

(d) It was inconceivable that during the entire month of January 1998, the master of Normar Splendour did not report the existence of the alleged critical conditions on board the vessel particularly in regard to the lack of food, water and supplies and the low morale of the crew and thereafter sought the defendant's instructions bearing in mind that numerous communications were sent to the defendant's agents.

(e) At least from 10 January 1998 when the defendant received Regship Services Sdn Bhd's report, the defendant became aware of the alleged critical conditions on board Normar Splendour but the defendant did nothing at all for almost four weeks or so until Normar Splendour broke arrest. Regship Services Sdn Bhd's report in exh. "OZB-1" of encl. 44 spoke of Normar Splendour's provisions "running very low" and that there was strict water rationing and the vessel's bunkers on board would not last more than 16.7 days before a complete shutdown of the vessel.

(f) Datuk Captain Hamzah bin Mohd Noor of Regship Services Sdn Bhd categorically stated that he visited Normar Splendour on 8 February 1998. Calculation wise, since the bunkers would have been completely exhausted about 16.7 days later, this meant that total exhaustion of the bunkers would take place approximately 25 February 1998. Yet, Normar Splendour managed to sail away in early February 1998. Mr. Jainil Bhandari questioned as to where the bunkers came from and he submitted that the master would not have had the means of purchasing bunkers on his own since the master was not even allowed to leave the vessel Normar Splendour. On these facts, Mr. Jainil Bhandari argued that the defendant must have supplied Normar Splendour with bunkers to enable her to operate after 25 February 1998 and, consequently, sail away from the jurisdiction of this court. It was further argued that if the defendant could supply Normar Splendour with bunkers, then it went against logic to say that the defendant did not provide the crew with food and water which were apparently required urgently.

(g) The defendant had appointed agents in Pasir Gudang, namely Osjay Shipping Sdn Bhd who could easily have provided the vessel Normar Splendour and her crew with the relevant supplies required, if instructed to do so. It appeared that the defendant had appointed Osjay Shipping Sdn Bhd as "husbandry agent and general supplier for the vessel" and that agent had in fact supplied provisions to Normar Splendour on previous occasion (an averment in para. 13 of encl. 51). So, Mr. Jainil Bhandari pointed out that there was no difficulty on the part of the defendant to instruct Osjay Shipping Sdn Bhd to supply Normar Splendour with provisions which were urgently required after the defendant had received Regship Services Sdn Bhd's report dated 10 January 1998. Yet, so submitted Mr. Jainil Bhandari, the defendant allowed the master and its crew to suffer the alleged adverse conditions for more than four weeks despite being aware of those impediments.

(h) Even though the defendant was aware by 10 January 1998 or thereabouts of the alleged critical conditions on board Normar Splendour, yet the defendant failed to inform the sheriff or the plaintiff that the vessel

Normar Splendour urgently required supplies (see the averments at paras. 6 and 7 of encl. 49 and para. 4 of encl. 54). In para. 9 of encl. 51, the defendant admitted that they did not make any request for supplies to the plaintiff.

(i) Even though Normar Splendour was under the custody and care of the sheriff whilst she remained under arrest, the defendant as owner of the vessel was nevertheless under a duty to maintain the vessel in good order and ensure that the crew were well taken care of during the period of arrest. It was said that the defendant was obliged to arrange for food and water and other essentials for their own crew, if these supplies ran short during the duration of the arrest. It was also said that if the defendant had any difficulty in providing for their crew, they could have easily informed the plaintiff, the plaintiff's solicitors or the sheriff and the latter could have easily arranged for the necessary supplies to be provided to Normar Splendour. Incidentally, the bailiff in his affidavit in encl. 54 at para. 10 deposed that the necessary arrangements to supply Normar Splendour with the necessary supplies could have been made, if so requested.

(j) It was pointed out that the plaintiff had deposited a sum of RM15,000 with the sheriff for the very purpose of absorbing whatever expenses incurred in regard to the arrest of Normar Splendour and this deposit till today remained unutilised since no requests were made to the sheriff or the plaintiff for any supplies to be provided to the vessel. This very piece of evidence can be seen in para. 7 of encl. 54.

(k) In compliance with the Rules of the High Court 1980, the plaintiff gave their solicitors' undertaking to the sheriff to meet any of the sheriff's costs and expenses in connection with the arrest of Normar Splendour. Consequently, there would have been no problems whatsoever in supplying Normar Splendour with food, water and other supplies if the plaintiff or the sheriff had been informed that such supplies were urgently required. It now transpired that no such requests for food, water or supplies were ever made.

(l) It was emphasised that at all material times, the defendant was represented by Malaysian solicitors who would be able to render legal advice when needed. But alas, there was no explanation in the defendant's affidavits as to why they did not consult their solicitors when they had problems. Instead the defendant made serious unfounded allegations against the court bailiff and had even misled this court, so the submission went.

(m) The defendant alleged in para. 8 of encl. 44 that the bailiff did not permit any ship to come alongside Normar Splendour or allow anyone to board

Normar Splendour or allow any of the crew members of Normar Splendour to leave the vessel. These allegations by the defendant have been denied by the bailiff at paras. 4, 6 and 7 of his affidavit in encl. 54. It was submitted that there was no logical reason as to why the bailiff would prohibit any ship from approaching Normar Splendour or prevent any crew from leaving Normar Splendour as the crew members were not placed under arrest.

(n) It was submitted that Ole Zimmerman Borresen asserted in encl. 44 that the defendant had no control over Normar Splendour as it was being operated under the instructions of the Bank of Scotland. But the latter through their London solicitors had unequivocally denied these assertions. Ole Zimmerman Borresen then shifted his stand and deposed at para. 18 of encl. 15 to the effect that the Bank of Scotland could not instruct the defendant in the operation and navigation of Normar Splendour. Using these instances as leverages, the submissions of the plaintiff were that Ole Zimmerman Borresen had clearly lied on oath and his credibility had been destroyed. It was for these reasons that Mr. Jainil Bhandari submitted that the affidavit evidence of Ole Zimmerman Borresen ought to be viewed with great circumspection.

(o) Mr. Jainil Bhandari submitted that the defendant had not provided any satisfactory explanation as to why they took more than nine months to come forward and explain to this court the circumstances leading to the arrest of Normar Splendour. The explanation for the delay that finally came was to the effect that the defendant was looking for solicitors in Malaysia and this explanation was said to be incredulous in the extreme. It was further submitted that if what the defendant said was true particularly in regard to the master who was said to have acted on his own in breaking arrest on account of the critical conditions on board Normar Splendour and if the defendant was sincere in making amends for Normar Splendour breaking arrest, the defendant would have immediately come forward to explain the situation and take the necessary steps to bring Normar Splendour back to Pasir Gudang – within the jurisdiction of this court.

(p) The plaintiff conducted their own investigations and it showed that after Normar Splendour broke arrest the defendant took pains to hide the vessel from detection (paras. 25 to 28 of encl. 49). The fax from the investigators in exh. "CHT-4" of encl. 49 which was dated 24 March 1998 showed that there were false rumours circulating as to the position of Normar Splendour and it appeared that the vessel was in hiding. This showed that the defendant was privy to the breaking of arrest of Normar Splendour.

Mr. Clarence Edwin, learned counsel for the defendant, summarised the reasons advanced by Mr. Jainil Bhandari in paras. (a) to (p) as alluded to above in one simple sentence: the plaintiff said it was inconceivable that the master of Normar Splendour would have acted on his own. Mr. Clarence Edwin also submitted that the rest of the matters highlighted by Mr. Jainil Bhandari were nothing more than mere conjectures. Mr. Clarence Edwin gave an example of that mere conjecture and it was his argument that the plaintiff sought to imply that by the number of telexes sent by Normar Splendour it must mean that great plans were under way for Normar Splendour to break arrest. Now, in regard to the value of circumstantial evidence of which the telexes can be categorised as such, reference to the case of *Bakshish Singh v. The State of Punjab AIR* [1971] SC 2016, a decision of the Indian Supreme Court, must be made. In that case, KS Hedge J in a short judgment had this to say at p. 2018 of the report:

> The law relating to circumstantial evidence has been stated by this Court in numerous decisions. It is needless to refer to them as the law on the point is well settled. In a case resting on circumstantial evidence, the circumstances put forward must be satisfactory proved and those circumstances should be consistent only with the hypothesis of the guilt of the accused. Again those circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

and can it truly be said that the plaintiff's evidence was "so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the" defendant and "such as to show that within all human probability the act must have been done by the" defendant? In my judgment, the answer would be in the negative. When Normar Splendour was initially arrested, the defendant instructed Messrs Skrine & Co to act on their behalf and to file the necessary applications to secure the release of Normar Splendour. The defendant proceeded one step ahead by discussing with the P & I Club to provide the necessary security for the release of Normar Splendour and to this end, P & I Club appointed Norwegian solicitors to act on their behalf. The defendant also proceeded to appoint R.S. Platou (Singapore) Pte Ltd to discuss with one Gordon Smith from the plaintiff's holding company in regard to the amount of security. All these endeavours of the defendant have been amply set out in para. 7 of encl. 51 and these endeavours were not consonant with the *mens rea* of someone who was planning for the vessel – Normar Splendour to break arrest. It might perhaps be asked this pertinent and germane question: Why should the defendant go through all the trouble of engaging counsel and negotiate the provision of

security for the release of Normar Splendour and wait for more than eight weeks before breaking arrest? Seen in its correct perspective, the facts gave rise to a reasonable doubt as to whether the defendant conspired with the master. It also gave rise to reasonable doubts whether the defendant was privy to and assisted in Normar Splendour breaking arrest. It must not be forgotten and one must not lose sight of the fact that the plaintiff had to discharge the burden of proving that the defendant knowingly assisted in the commission of the contemptuous act of breaking arrest. At this juncture, it is opportune to refer to the case of *Lord Wellesley v. The Earl of Mornington* [1848] 11 Beav 786. That was a case where an injunction had been granted to restrain the Earl of Mornington from cutting timber but the terms of the order did not extend to his "servants and agents." The Earl's agent and manager by the name of Batley, cut the timber and an application was made to the court to commit Batley for contempt of court. At p. 786 of the report, the following passage appears:

> The Court will interfere, where a person, though not enjoined, wilfully assists in the act forbidden by the [182] Court as in *Lewes v. Morgan* (5 Price, 42), where after an injunction granted against Morgan from receiving rents, Lewes, the solicitor of Morgan, with knowledge of the order, received them, an order was made for his committal for the contempt.

Lord Langdale, the Master of the Rolls at p. 787 observed:

> By the forbearance of the plaintiff, I am spared the painful necessity of making an order. If the matter had been pressed, I should have found it my duty to commit Mr. Batley for his contempt in intermeddling with these matters; some of his acts in contravention of the injunction are distinctly proved, though with respect to others there may be some shadow of doubt.
>
> Batley, in the position in which he was, and knowing the duty of the Earl of Mornington, ought to have taken care not to do any acts, in violation of the order of the Court. I am glad to be relieved from the necessity of ordering a committal, but Batley must pay the costs of the motion.

Using the principle of law as set out in *Lord Wellesley v. Earl of Mornington [supra]* as a barometer, an agent cannot automatically be liable for contempt committed by his principal unless it can be proved that the agent with the knowledge of the order of the court, assisted the principal in the commission of the contemptuous act. Applying the principle in reverse position it can be said that the principal cannot be liable for the contemptuous act committed by his servant unless the principal knowingly assisted in the commission of the contemptuous act. In the context of the present case, for the defendant to be guilty of the contempt committed by the master of Normar Splendour, the plaintiff must prove that the defendant knowingly assisted in the vessel –

Normar Splendour breaking arrest. No evidence was adduced by way of an affidavit evidence to show that the defendant knowingly assisted in the breaking of arrest of that vessel.

It was alleged that the defendant had "hidden" Normar Splendour after its arrest and this proved, so it was submitted, that the defendant was privy to Normar Splendour breaking arrest. With respect, even if it were true that the defendant hid Normar Splendour, this was not evidence to show that the defendant had the necessary *mens rea* at the time the contempt was committed by the master since the hiding of the vessel was a subsequent act. The defendant, at any rate, was quite adamant when they made it clear that they did not at any time "hide" Normar Splendour. The plaintiff relied heavily on the facsimile transmission from ICC – International Maritime Bureau dated 24 March 1998 as seen in exh. "CHT-4" of encl. 49 to drive home the message that Normar Splendour was in hiding. The third paragraph of that facsimile transmission was worded thus:

> Our enquiries have shown that there are a number of separate organisations attempting to locate the vessel and a numerous false rumours circulating as to the vessel's present condition and position. To date all of which have proved to be incorrect and it would appear that the MV Normar Splendour is currently in hiding.

and its value as evidence that the defendant was in fact guilty of hiding Normar Splendour was highly questionable for several reasons:

(a) there was nothing in that facsimile transmission to show what were the exact inquiries that were made;

(b) there was nothing in the facsimile transmission to show who exactly were the "number of separate organisations" that were attempting to locate Normar Splendour and what were the means employed by them to do so;

(c) there was also nothing in the facsimile transmission to show who exactly planted or spread the "false rumours" about Normar Splendour's present condition and location;

(d) there was nothing in the facsimile transmission to indicate to whom and by what means were these "false rumours" spread; and

(e) the usage of the words "it would appear" show that the maker of the statement was unable to say with any degree of certainty whether Normar Splendour had in fact gone into hiding.

On the other end of the fence, we have evidence emanating from the defendant to show that the defendant unequivocally denied that Normar Splendour was in hiding. In encl. 51 at paras. 22 and 23, the defendant deposed by way of

a reply to the plaintiff's allegations in paras. 25 to 28 of encl. 49 in these words:

> 22. As regards para 25 to 28 of Cheok's Affidavit, I am baffled by the allegations that we are trying to hide the vessel. We have made no efforts to hide the vessel. If one wants to hide the vessel, one could easily change its name or change the ownership of the vessel to avoid detection. But we did not and the vessel is still registered in the same name and owned by the same party. The fact exhibit "CHT-3" of Cheok's Affidavit indicates that the vessel is trading between Yemeni ports is confirmation that we did not hide the vessel. Annexed hereto and marked as "OZB-2" are copies of the statement of facts and tanker time and loading report which clearly indicates that the vessel is still named "Normar Splendour" and papers are filed and endorsed by relevant port authorities. I do not see the reason for the Defendants to do so in light of this unresolved problem with the Plaintiffs.
>
> 23. I do not understand the allegations of Thomas Cheok in para 26 and 27 of his affidavit. I am advised by our management office that Thomas Cheok may be confused in his understanding that vessels these days should continue to use shore stations for correspondence as was the case some 10 to 20 years ago. Nowadays, the usage of onshore stations are almost negligible if not totally outmoded. Annexed hereto and marked as "OZB-3"are copies of the invoices from Radio-Holland Communications which the vessel is still using. The vessel has a satellite navigation and communication system. Almost any vessel anywhere in the world now can use the latest equipment to connect with satellites whether the vessel is in West Europe, Asia or Australia. The usage of those satellite services depends on the coverage and clarity of communication lines. This is much like the roaming service for mobile phones except that vessels do not communicate with onshore communication centres but straight up to the satellite in orbit which then transmit the signals down to the earth stations. From the invoices set out in "OZB-3" the vessel has used communications of satellite services through Australia, Britain, France, Turkey, Italy and Singapore.

Logic would simply override everything else. Logic prevails. No one would hide something and at the same time parade the very thing that was sought to be hidden for everyone to see. Normar Splendour was in the Indian subcontinent on one occasion and at Yemeni ports on other occasion. This proved beyond reasonable doubt that Normar Splendour was not hidden by the defendant.

It was also not disputed by the parties that Normar Splendour at the time of its arrest at Pasir Gudang port was mortgaged to the Bank of Scotland and remained mortgaged to that bank at all times. What could the defendant possibly achieve from hiding Normar Splendour when the very vessel was in

itself an encumbered property? To say that the defendant was hiding Normar Splendour when it broke arrest was totally incomprehensible and defied logic and common sense. For these reasons, it was my judgment and I so hold that the plaintiff had failed to prove beyond reasonable doubt that the defendant was privy to Normar Splendour breaking arrest.

Essentially civil contempt concerns the enforcement of judgments or orders of the court. It would not be an answer to an action for contempt to say that the order disobeyed should not have been made in the first place. The proper course would be to set aside the order that had been made. Romer LJ in lucid terms said in *Hadkinson v. Hadkinson* [1952] All ER 567 CA, at p. 569:

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.

In the same vein, Lord Donaldson MR said in *Johnson v. Walton* [1990] 1 FLR 350 at 352:

> It cannot be too clearly stated that, when an injunctive order is made or when an undertaking is given, it operates until it is revoked on appeal or by the court itself, and it has to be obeyed whether or not it should have been granted or accepted in the first place.

The state of mind plays a pivotal role to determine the nature of the penalty of the contemnor. For mitigation purposes, the *bona fides* of the contemnors, their reasons and motives and their states of mind are certainly relevant factors to be considered (*Re Mileage Conference Group of the Tyre Manufacturer's Conference Ltd's Agreement* [1966] 1 WLR 1137, 1162; *Knight v. Clifton* [1971] Ch 700, 721; *Re Kerly Son & Verden* [1901] 1 Ch 467; *Re H's Settlement, H v. H* [1909] 2 Ch 260, 264; and *Miller v. Scorey* [1996] 1 WLR 1122, 1132 D-E). The kind of penalty to be imposed on the master of Normar Splendour for breaking arrest must surely be the most difficult task for this court to undertake of which I have more to say in the later part of this judgment. I have held that the defendant was not privy to Normar Splendour breaking arrest and there was nothing on record for me to change my mind.

What Is The Standard Of Proof For Contempt Cases?

Civil contempt just like criminal contempt must be proved beyond reasonable doubt (*Northwest Territories Public Service Association v. Comr of the Northwest Territories* [1980] 107 DLR (3d) 458 at 479; *Crown Zellerbach Canada Ltd v. Annand* [1972] 27 DLR (3d) 129; *Canadian Metal Co Ltd v. Canadian Broadcasting Corpn (No: 2)* [1975] 48 DLR (3d) 641 at 660; *Re*

Sheppard and Sheppard [1976] 67 DLR (3d) 592 at 594 and *Re Regina and Monette* [1975] 64 DLR (3d) 470 at 473). Lord Denning MR in the case of *In re Bramblevale Ltd* [1970] Ch 128 at 137 succinctly said:

> A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time – honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence.

But where there were two equally consistent possibilities open to the court, it would certainly not be right for this court to hold that the offence of contempt had been proved beyond reasonable doubt (*Re Bramblevale Ltd [supra]*). Russel LJ in *Knight v. Clifton* [1971] Ch 700 at 707 dutifully followed *Re Bramblevale Ltd [supra]* and this was what his Lordship said:

> Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent.

Mr. Clarence Edwin in his article entitled *"Beyond Reasonable Doubt - The Golden Thread Weakened ?"* [1998] 1 CLJ i, wrote in lucid terms the following (see p. 1x):

> The cardinal principle in a criminal justice system is that the prosecution must prove the guilt of the accused beyond reasonable doubt. The phrase 'to prove beyond reasonable doubt' refers to the standard of proof which must be satisfied by the prosecution before a court of law would return a guilty verdict. This standard, in my view, is inter-related to another maxim which constitutes a fundamental pillar in an adversarial system of criminal justice namely that a person is innocent until proven guilty.

There can therefore be no doubt that the appropriate standard of proof would be beyond reasonable doubt. Mr. Jainil Bhandari submitted that the deponent of the defendant's affidavits one Ole Zimmerman Borresen had lied on oath and his credibility was therefore destroyed or demolished at its source. A submission was even made imploring this court to disregard the evidence of Ole Zimmerman Borresen. The "lie" which Ole Zimmerman Borresen was supposed to have made was related to the so-called "back-tracking" in regard to the Bank of Scotland's involvement in the matter. It was with this scenario in mind that the plaintiff believed that it had proved that the defendant was guilty of contempt. At this juncture, it would be opportune to reproduce the relevant paragraphs where the plaintiff alleged that the defendant had lied on oath. At para. 12 of encl. 44, it was deposed that:

> 12. At present, the vessel is managed by the Defendants under the instructions of Bank of Scotland, the current financiers of the vessel. The financier has indicated that they wish to place the vessel under judicial sale in the near future. In that event, the Defendants hereby state that if there are any balance of sale proceeds which the Defendants are entitled to, the Defendants are prepared to hold the same as security towards the Plaintiffs claim pending arbitration if this Honourable Court so orders.

and at para. 9 of encl. 47, it was deposed that:

> 9. The vessel was mortgaged to Bank of Scotland. The bank is now instructing the Defendants with regards to the operation of the vessel. I am advised by the bank that they intend to put the vessel up for judicial sale in the near future. It is unlikely (with the present downturn of the market for such vessels) that there would be sufficient proceeds even to cover the outstanding ship mortgage. If there should be any excess thereof, I am prepared on behalf of the Defendants to put the excess sum of the sale proceeds (after the bank's interest is taken care of) into court as security for the Plaintiffs.

The defendant was quite truthful. The defendant did not deny that the bank of Scotland, through its solicitors, had placed on record that the bank denied any involvement in Normar Splendour breaking arrest. The bank of Scotland also denied that it instructed the defendant in regard to the operation of Normar Splendour. But somehow from these set of facts, Mr. Jainil Bhandari submitted that the defendant committed the contemptuous act of breaking arrest. The correct perspective can easily be discerned by referring to para. 18 of the affidavit of Ole Zimmerman Borresen in encl. 51 where he deposed as follows:

> 18. As regards paragraph 23 and 24 of Cheok's Affidavit regarding my statement that the vessel is being managed under the instructions of Bank of Scotland, I shall clarify as follows. I understand that I may have used the words that 'the vessel is presently managed by the Defendants under the **instructions** of Bank of Scotland ...' too strongly. The Defendants have been in constant discussion with the Bank and its lawyers on the re-financing plans concerning the vessel. I admit that the Bank cannot 'instruct' the Defendants in its operation or management of the vessel. However as the loan to the Bank is non-performing for some time, the Defendants were constantly liaising with the Bank on methods of resolving this financial crisis created by the Plaintiffs. This forms the subject matter of the Defendants' claim in the arbitration. In fact, it forms the very basis of survival of the Defendants by preserving its rights under the charterparty with the Plaintiffs to go for damages against the Plaintiffs. No decision has been made yet but the Defendants have informed the Bank of its current trading activities of the vessel. I have assumed since the Bank had not objected to this mode of operation of the vessel that some form of understanding has been reached in relation to the operation

> and management of the vessel. This was my impression of the situation. I do not wish to implicate the Bank in anything that could affect their position in this present case. If I have, I apologise to this Honourable Court and to the Bank as the misunderstanding was inadvertent. I hereby categorically state that the Bank was not involved and had no knowledge of the vessel breaking arrest and the Bank had not in anyway participated in the Defendants' current operation and management of the vessel after the breakage of vessel. I have been furnished with correspondence from Watson, Farley & Wiliams dated 21.12.1998 and 08.01.1999 exhibited as 'OZB-1' herein where the Bank's lawyers have confirmed their non-involvement in the case. I wish to clarify that I had not intended to cast any aspersions on the Bank about their involvement in the present case in light of my explanation here. Consequently, I deny that I had lied on oath in making the statement under paragraph 12 of my 2nd Affidavit.

which clearly clarified the situation once and for all. It seemed that all the parties had misunderstood the meaning of the earlier paragraphs in the defendant's affidavits. The defendant believed that they were merely deposing to the fact that they kept the mortgagee bank – the bank of Scotland, apprised of the status of Normar Splendour but the plaintiff understood that to mean that the defendant was deposing that the bank of Scotland was involved in Normar Splendour breaking arrest and the continuing contempt committed by the master of Normar Splendour. In my judgment, this was not evidence that the defendant had "lied" on oath and Mr. Jainil Bhandari's submission that Ole Zimmerman Borresen's credibility was completely destroyed was without merit entirely. In the words of Lord Denning M.R. in *Re Bramblevale [supra]* there must be some "further evidence" to show that the defendant had conspired with the master or was privy to and assisted in Normar Splendour breaking arrest in order to incriminate the defendant. In my judgment, the plaintiff failed to adduce cogent evidence to satisfy this court beyond reasonable doubt that the defendant was a party to the contempt committed by the master.

In a nutshell, Mr. Clarence Edwin submitted that prayers (1) and (2) of encl. 41 should be dismissed with costs and he fashioned his arguments along these lines:

(a) the burden was on the plaintiff to prove beyond reasonable doubt that the defendant, as opposed to master of Normar Splendour, committed contempt of court;

(b) in order to prove that the defendant committed contempt of court, the plaintiff would have to prove beyond reasonable doubt that the defendant conspired with the master of Normar Splendour to break arrest or were privy to and assisted in the commission of the contempt; and

(c) the plaintiff relied on circumstantial evidence which did not reach the standard of proof of beyond reasonable doubt and, consequently, there was no proof to show that the defendant conspired with the master of Normar Splendour or was privy to and assisted in Normar Splendour breaking arrest.

I wholeheartedly agreed with these submissions.

What Were The Circumstances Leading To Normar Splendour Breaking Arrest?

Of critical importance would be the circumstances that prevailed on board Normar Splendour at the material time when the vessel broke arrest. An examination of these circumstances would enable this court to do justice to the parties – after all as the saying goes *"fiat justitia ruat coelum"* (let justice be done though the heavens should fall).

Now, we have the available evidence to show that the defendant had gathered information from the master, subsequent to the vessel breaking arrest, that the master did what he did simply because he feared for his safety and that he was concerned with the deteriorating conditions on board Normar Splendour. When Normar Splendour was under arrest, the vessel was anchored at the outer anchorage of Pasir Gudang port and no representatives from the relevant authorities visited the vessel for a period exceeding two months after the vessel was arrested. It seemed that not a single person was allowed on board Normar Splendour and the vessel had inadequate supplies of both water and food. The situation on board Normar Splendour was precarious. The threat of mutiny was looming in the background. The master of Normar Splendour had no choice but to exercise his judgment to suit the circumstances prevailing on board the vessel. So the master of Normar Splendour decided to break arrest in order to appease the crew and obtain the proper supplies of food and water. All these averments can be seen in paras. 6 and 7 of encl. 44, paras. 6, 7 and 8 of encl. 47 and paras. 5 to 11 of encl. 51. It must be emphasised that these conditions on board Normar Splendour were not fictional nor figment of the defendant's wild imaginations but rather it was corroborated by the evidence of Captain Datuk Hamzah bin Mohd Noor of Regship Services Sdn Bhd who was engaged to study the situation on board Normar Splendour and report the same to the defendant. The report of Captain Datuk Hamzah bin Mohd Noor, formerly a harbour master, was indeed interesting. It showed that save for having Normar Splendour arrested, the plaintiff was not particularly concerned whether the crew and the master were properly cared for during the arrest. The report of Captain Datuk Hamzah bin Mohd Noor was produced and exhibited as exh. "OZB-1" in encl. 44 and the relevant excerpts would now be reproduced:

5. Being under arrest, the Authorities had not allowed any authorised vessel, or craft to come alongside her for any purpose, and similarly, it is impractical, even it is possible for the crew to go ashore for any purpose.

6. The morale of the crew was very low. As seafarers, they are not allowed to perform the functions expected of them. They questioned me as to why they are being treated like criminals and being detained constructively on board the ship. They were also discussing about their rights and position under the International Transport Federation (ITF Rules) since I believe some of the crew are members of the Federation.

7. In order to consolidate and extend the availability of Fresh Water on board and due to the long duration of the detention and not knowing when she will eventually be freed from detention, the Master had introduced and implemented strict water rationing for 15 minutes only per day for drinking, cooking and bathing purposes only. So, doing their laundry is a luxury they cannot presently afford.

8. The ship's provisions are running very low. Being of mixed European and Asian crew, the stock of staple European food such as potatoes are very low and will run out in a matter of days. Similarly with other essential food items such as fresh vegetables and fruits are no longer on board.

9. The vessel has also run out of bonded stores and had requested for cigarettes to be supplied promptly.

10. The crew are also concerned about their salary and monthly allotments to be sent to their families. Some of the crew mentioned that they are due for repatriation by the 15th January 1998 and some of those found difficulties in observing Ramadan on board and unsure whether they would be repatriated home by the end of Ramadan.

It must be noted that Captain Datuk Hamzah bin Mohd Noor's report was a report from Regship Services Sdn Bhd and that report was addressed to Ole Zimmerman Borresen, the chairman and CEO of the defendant. Regship Services Snd Bhd sent three letters to the deputy port officer, port of Pasir Gudang, Johor dated 11 January 1998, 24 January 1998 and 23 February 1998 conveying their concern and enquired in regard to the development of Normar Splendour. I will now reproduce the letter dated 11 January 1998 which was exhibited as exh. "HMN-1" of encl. 53 and that letter communicated in no uncertain terms the condition of Normar Splendour. Paragraph 6 of that letter was worded thus:

> Further, take note that your continued custody of the originals of these certificates had placed the vessel immobile in all aspects and thus subjected her to remain at her present anchorage position and subjecting her to all conditions of the weather without the alternative of seeking shelter. As such

> the vessel is also unable to take avoiding action, or any action whatsoever to safeguard her safety, and considering her close proximity to the Internationally recognised Traffic Separation Scheme, you may be placing this maritime property at peril and greater risk of collision. Also due to the long duration of her detention, the conditions on board the vessel has deteriorated and the morale of the innocent Master and crew is very low.

and the letter was received by the harbour masters office on 12 January 1998 as can be seen by the acknowledgement of receipt at the bottom right corner of the said letter. However, the harbour masters office did not reply to this letter and this prompted Regship Services Sdn Bhd to send another letter dated 24 January 1998 enquiring as to the outcome of their earlier letter. This time, the harbour masters office responded and at para. 3 of their letter dated 24 January 1998, the reply was rather curt:

> 3. Jabatan sedang menunggu jawapan bertulis dari Pejabat Pendaftar Mahkamah Johor Bahru mengenai permintaan pihak tuan supaya dokumen kapal tersebut dikembalikan kepada Nakhodanya.

To argue as did Mr. Jainil Bhandari argued that the adverse conditions on board Normar Splendour was not communicated to anyone was indeed misleading as it went against the grain of the available documentary evidence. Captain Datuk Hamzah bin Mohd Noor deposed at paras. 10, 11 and 12 of encl. 53 that the conditions on board Normar Splendour were in fact verbally communicated to the deputy port officer and the sheriff. This was what the deponent said:

> 10. After I return from inspecting the vessel, I immediately arranged to visit the Sheriff and Deputy Port Officer at Pasir Gudang. They were more concerned about their authority to take the ship documents when I questioned them about their legal rights to detain those documents. I also told them about my concerns of the ship conditions and safety. I sought the assistance of the Sheriff to alleviate the crew situation and for the return of the ship documents from the marine department to the Master. The Sheriff says he will look into the matter. The Master had applied to have the ship documents returned to the vessel. I have appealed on several occasions and my company have written to the Deputy Port Officer and the Harbour Master of Johor in a letter dated 11.01.1998 requesting for the return of these documents and also to inform him that **'the conditions on board the vessel has deteriorated and the morale of the innocent Master and crew is very low'**.
>
> 11. I saw Sheriff again on the 09.01.1998 twice and 10.01.1998 twice. All in, I have discussed and made the same request to the Sheriff at least 5 times. I have also in the course of that period met up with the port officer who did the arrest several times to highlight the problems about the vessels. Annexed hereto and marked collectively as "HMN-1" are copies

of the relevant correspondence which I have written to the relevant authorities and to the Defendants about the situation and some of the replies that I have obtained.

12. I have reported the matters to the Defendant and informed Mr. Borresen about the critical moral conditions on board the vessel and also about the slow response we are getting from the authorities to deal with the crew problems. Mr. Borresen asked me to assist in solving the vessels' problems and I tried very hard to liaise with the authorities to look into the welfare of the vessel and the crew.

and to me a person of standing and position in life like Captain Datuk Hamzah bin Mohd Noor would not lie on oath and he would not be in a position to conjecture dates when he met the sheriff and the other officers. As I said the harbour master had acknowledged receipt of the letter from Regship Services Sdn Bhd and the harbour master too confirmed that he had communicated the contents of the letter from Regship Services Sdn Bhd to the Registrar of the High Court and all these confirmed that the appropriate authorities had been alerted in regard to the situation on board Normar Splendour. The bailiff also deposed an affidavit in encl. 54 and there he did not dispute the fact that the port authorities and the sheriff had been informed of the condition on board Normar Splendour by Regship Services Sdn Bhd. Now, since there was no evidence whatsoever from the port officers or the sheriff to dispute the fact that the adverse conditions on board Normar Splendour had been communicated to them, it must therefore be deemed that the averments made by Captain Datuk Hamzah bin Mohd Noor were admitted *(Ng Hee Thoong v. Public Bank Berhad* [1995] 1 MLJ 281 and *Abdul Razak bin Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339, [1995] 2 AMR 1174, [1995] 2 MLJ 287). In my judgment, from the available documentary evidence the adverse conditions did exist on board Normar Splendour and they were duly communicated and conveyed to the relevant authorities.

The present case before me cannot be listed as the first case of its kind where a vessel – Normar Splendour, broke arrest as a result of extenuating circumstances. *The Merdeka* [1982] 1 Lloyd's Law Reports 401 was also a case where extenuating circumstances existed. Mr. Justice Sheen in a short judgment traced the facts of *The Merdeka [supra]* in these words (at p. 402 of the report):

> On this motion, Counsel on behalf of the Admiralty Marshall moves the Court for an order that Cornelis G. Verhey be committed to Her Majesty's prison, or that such penalty be imposed upon him as shall appear to the Court to be proper, for his contempt in removing his ship Merdeka from Hakin Wharf, Milford Docks, between about 0450 and 0500 on September 11, 1981, and

taking her out of the jurisdiction when he knew that Merdeka had been arrested by order of this court.

At p. 403 to p. 404 of the report in the same judgment, Mr. Justice Sheen continued:

Captain Verhey is 28 years old and he is the owner of this small ship. It was his first command. He is a man who comes from a seafaring family. His grandfather was master of a ship; his father and mother lived on a ship and he grew up on one. His livelihood has always been earned through working in ships in a number of different capacities, both in the engineroom and on deck, and he has recently obtained a certificate which enabled him to command coastal vessels. As I say, he is the owner of Merdeka. He tells me, and I have no reason to doubt it, that earlier this year he was not making a great profit out of the vessel. He employed these four Ghanaian seamen at an agreed wage and paid certain bonuses. His ship was arrested once by cargo claimants and then the arrest was lifted. He then found on the following day that his ship was arrested again on a claim by these four seamen for over 10,000 pound unpaid wages. He was greatly distressed by that. I think it would be wrong for me to make any comment on the size of the claim because it may be dealt with in another jurisdiction. There is no doubt that he became somewhat inflamed and, as Miss Bucknall has said on his behalf, not really himself because of the distress which he felt.

That may explain, but it does not excuse, his very foolish conduct. He broke the arrest and sailed in the circumstances which I have recounted. It was made easier for him to do so by what appears to me to be a complete dereliction of duty by two watchmen, namely A.D. Ayers and his son L.A.Ayers. I have not heard their oral evidence; I have read their affidavits. But, having been told to keep a watch on the vessel – and they only had to keep a close watch for two hours – they thought that looking out once every 20 minutes was adequate. Clearly it was not. As I have said, not long after Captain Verhey sailed he realized the foolishhness of his action and it is to his credit that he has come back to this country voluntarily, not in the course of trading but at his own expense. He has come back to this Court to face these proceedings and he has apologized.

It must not be thought that this Court will not commit a master to prison. In a proper case the Court will certainly do so. Were it not for the extenuating circumstances which I have outlined, this case is one in which I might well have decided to make a committal order because it was a flagrant and deliberate contempt. I regard it as important that the Court should be moved on behalf of the Admiralty Marshal whenever the orders of the Court are not obeyed. As I have already indicated, Mr. Reeder quite properly opened the case as a serious contempt. At that stage he, Mr. Reeder, had not had an opportunity of seeing the draft affidavit which was put before me on behalf of Captain Verhey.

Proceedings of this nature are necessary in order to impress on others the consequences of flouting the orders of this Court. Having decided that I can

> properly deal with this case by imposing a fine, the question arises as to how much that fine should be. I must mark my sense of the seriousness of the offence, but I take into account three matters: firstly, Captain Verhey's contrition, which I believe to be genuine; secondly, that he had incurred expenses himself in instructing solicitors and Counsel (and in the weeks ahead he may think that that was money well spent because the case has been extremely attractively presented on his behalf); and thirdly, that he must pay the costs of the Treasury Solicitor, which I assess in the sum of 2,000 pound. For these reasons, and bearing in mind the other expenses which I have already mentioned, I think that justice can be done in this case by imposing a fine of 350 pound.

The facts in the present case were more aggravating and the extenuating circumstances graver than *The Merdeka*. In my judgment, the situation on board Normar Splendour was more than merely extenuating circumstances. The report of Captain Datuk Hamzah bin Mohd Noor showed that there was a severe shortage of food and the master of the vessel – Normar Splendour, had to impose water rationing. Just imagine the scenario on board Normar Splendour at that time. There was fear, frustration, anger and a sense of loss all rolled into one. These were felt by the crew which inevitably led to aggression and violence. The master feared for his own safety. The master must do something quick to appease his restless crew members. Of course, it would be a matter of conjecture whether there would be mutiny on board Normar Splendour. No one would know. But one thing was certain – the master of Normar Splendour wasn't going to wait to find out. True the master had committed contempt by breaking arrest but the extenuating circumstances as pointed out by Mr. Justice Sheen in *The Merdeka* did not warrant this court to grant the draconian orders sought for by the plaintiff in encl. 41. This was my judgment and I so hold accordingly.

What Were The Events Subsequent To Normar Splendour Breaking Arrest?

It must be recalled that after the vessel – Normar Splendour, broke arrest and the master communicated this to the defendant, the defendant wasted no time and quickly ordered the master to bring the vessel back to Pasir Gudang. But the master refused to comply. These facts were amply set out in para. 17 of encl. 51:

> 17. As regards para 21 and 22 of Cheok's Affidavit, the Defendant upon learning of the Master's action in breaking arrest, tried to persuade him to return to Pasir Gudang. At that point in time, we were still busy with Datuk Captain Hamzah in liaising with the authorities to deal with the situation. The Master was told to be patient and the Defendants were doing the best it could to lift the ship arrest order and allow the vessel to sail. The Defendants were financially strapped with the arrest since the vessel was our sole source of income. The arrest also resulted in the

> cancellation of the existing charteparty then. The Defendants had no reason to jeopardise its own case by running foul of Malaysian laws. It was not in the interest of the Defendants to operate a vessel with a subsisting warrant of arrest. I was caught by surprise upon being informed of the breakage of arrest. We had immediate discussions with the Master to go back to Malaysian waters or to offer the vessel for re-arrest in Singapore waters. The Master and crew were adamant about not going to Malaysia or be re-arrested in Singapore. We were not getting any cooperation from crew. The Master and crew wanted to be released from their responsibilities. They said they were not part of the dispute with the Plaintiffs and they felt trapped like (prisoners). We had no choice but to allow the Master and crew to bring the vessel back to the Port of Dubai, United Arab Emirates where our management office was located. We relieved the Master and crew at that port. After that we informed Evensens & Co about the situation who promptly informed Skrine & Co.

Mr. Jainil Bhandari took exception and he submitted that the defendant was giving an incredulous explanation for Normar Splendour breaking arrest and it was his submission that the defendant should have taken the necessary steps to bring the vessel back to the port of Pasir Gudang. But surely one must appreciate the situation where the owner of Normar Splendour was in Dubai and the master having control of the vessel was on the other end of the earth and refused to obey orders given by the defendant to sail the vessel back to Pasir Gudang. Mr. Clarence Edwin rightly posed these pertinent questions:

(i) did the plaintiff expect the defendant to somehow arrange to be miraculously transported onto the vessel so that the defendant could personally sail the vessel back to Pasir Gudang?

(ii) was the plaintiff suggesting that the defendant should have just left Normar Splendour floating aimlessly in international waters indefinitely?

When the defendant knew that the master of Normar Splendour was not going to bring back the vessel to Pasir Gudang, the defendant had no choice but to order the master to bring back the vessel to Dubai so that the master and the crew could be relieved of their posts. But Mr. Jainil Bhandari was not satisfied and he submitted that having relieved the master and the crew in Dubai, the defendant should have employed a new master and fresh crew to sail the vessel back to Pasir Gudang. This received the adverse comments by Mr. Clarence Edwin. The arrest of Normar Splendour had caused undue hardship to the defendant. The existing charterparty was cancelled as a result of that arrest and it caused the cessation and complete standstill of the defendant's use of the vessel as exemplified in para. 17 of encl. 51. Having caused financial hardship to be incurred by the defendant, the plaintiff had the audacity to suggest that the vessel should have been sailed from Dubai back to Pasir

Gudang, Johor Bahru. How thoughtful of the plaintiff! At para. 19 of encl. 51, Ole Zimmerman Borresen deposed as follows:

> 19. I do not wish to belabour the issue about the current status of the vessel arising from the purported conclusions implied by the Plaintiffs' investigation. The Defendants admit that the vessel have traded in India after the arrest. It did so where there is income to be earned before the fate of the vessel is finally determined. The Defendants have considered bringing the vessel back to Pasir Gudang but it is not financially viable to do so and difficult to get the crew (albeit a new crew) to bring the vessel here. The Defendants are severely crippled financially by the Plaintiffs' action in this case and their refusal to submit to arbitration in London, is to my mind, an act which they fear. I have been advised by the Defendants' London solicitors that the Defendants have a good case against the Plaintiffs for reasons set out in the earlier affidavits of mine filed herein.

The devastating effects of a warrant of arrest on a shipowner are too well-known. The late Arulanandom J in *The "Beauty Orchid II"* [1977] 2 MLJ 83, 84 had this to say:

> While under Admiralty practice once a summons and claim are shown to the court the powers of arrest can be exercised immediately, the consequences of the arrest are often crippling or severely damaging to the shipowners. No doubt there is an undertaking in damages and if in the long run the plaintiff loses his case, he will have to pay damages but the amount of damages the defendant will recover will depend on the assets or the solvency of the plaintiff. The arrest of the ship immediately exposes the defendants to various claims from cargo owners, masters, crews and others affected by the arrest.

and it would not be a cheap affair to bring Normar Splendour back to Pasir Gudang. The defendant was very magnanimous and had suggested other alternatives to end the continuing contempt but the plaintiff simply spurned these suggestions. At paras. 20 and 21 of encl. 51, the defendant made the necessary suggestions and they were in this fashion:

> 20. The Defendants wish to bring a quick resolution to this current dispute with the Plaintiffs. As regards the status of the vessel, I have been authorised by the Defendants to inform this Honourable Court that they are prepared to put up the vessel for sale either through the direction of this Honourable Court or by mutual agreement between the Plaintiffs and Defendants. Any excess proceeds of sale may be kept by Bank of Scotland or deposited with this Honourable Court or such other party as the Defendants may desire pending the resolution of the arbitration.
>
> 21. Alternatively, the Defendants will sail the vessel to the nearest port of convenience in Western Europe or Middle East to have the vessel arrested by the Plaintiffs, if they so desire.

and Mr. Jainil Bhandari submitted that this court will have no jurisdiction to enforce such sale or any orders ancillary thereto. Not to be outwitted, the defendant suggested by way of an alternative that the vessel be sold by way of mutual agreement between the plaintiff and the defendant. The plaintiff disagreed and said that they should not be made to incur "additional costs" and expenses in re-arresting the vessel – Normar Splendour. But the plaintiff forgot that the "additional costs" ranked in priority to the mortgagee's claim and the plaintiff would be able to recover the "additional costs" from the proceeds of a judicial sale. In rebuttal, the plaintiff contended that the defendant's breach of the warrant of arrest had deprived the plaintiff of its security and for this reason Normar Splendour should be ordered back to the port of Pasir Gudang to restore the *status quo*. At this juncture, it would be germane to examine the nagging question of whether the plaintiff had a right to arrest the vessel – Normar Splendour, as security for a pending arbitration.

Was There Full And Frank Disclosure When The Plaintiff Applied For A Warrant Of Arrest And Can The Admiralty Jurisdiction Of The High Court In Malaysia Be Invoked To Arrest A Vessel For The Purpose Of Obtaining Security For An Award That May Be Made In Arbitration?

As the law now stands, it is no answer to a charge of contempt that the order disobeyed was in itself wrongful. But the fact that the order was in fact wrong is in itself a crucial consideration in a contempt proceeding. Thus, the issue of whether the Malaysian High Court's admiralty jurisdiction can be readily invoked to arrest a vessel like Normar Splendour for the purpose of obtaining security for an award which may be made in arbitration (especially where the agreement between the parties provide for arbitration) is a factor worth considering.

Section 24(b) of the Courts of Judicature Act 1964 enacts as follows:

> 24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include –
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981;

and it was introduced through the Courts of Judicature (Amendment) Act 1987, Act A670 which came into force on 22 May 1987. Prior to the amendment, s. 24(b) of the Courts of Judicature Act 1964 was worded as follows:

> 24. Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include –
>
> (b) the same jurisdiction and authority in relation to matters of admiralty as is for the time being exercisable by the High Court of Justice in England.

Until the passing of the Civil Jurisdiction and Judgment Act 1982 the High Court of Justice in England's admiralty jurisdiction should not be invoked to arrest a vessel as security for arbitration. That this was so is evident from the judgment of Justice Brandon in the case of *The "Cap Bon"* [1967] 1 Lloyd's List Law Reports 543 where Justice Brandon said at p. 546 to p. 547:

> In my view the plaintiffs' approach to this matter is based on a misconception. In my view, when an action in rem is brought the security thereby obtained is security in respect of any judgment which may be given by the Court after hearing and determining the claim. The security so obtained also covers the payment of any sum which may become due under an agreement whereby the action is settled. But the security so obtained is not in my view available for the purpose of ensuring payment of the judgment of some other Court or for the purpose of ensuring payment of the award of an arbitration tribunal.

Further down the same page, Justice Brandon continued to say:

> It is to be inferred from that that the object of the process in rem is to provide security for a plaintiff in respect of any judgment which he may obtain as the result of the hearing and determination of a claim. That is the purpose of proceeding in rem and, subject to the point I made, that it covers also payment of a sum due under a settlement in an action, it is the sole purpose of such process. It seems to me that in the present case the plaintiffs have sought to invoke the Admiralty jurisdiction of the Court in rem for a wholly different purpose, or at any rate seek now to maintain that process for a wholly different purpose. That different purpose is not security for the payment of a judgment of the Court or security for the payment of a sum due under the settlement of an action in the Court, but security for the payment of an award in an arbitration conducted pursuant to Clause 33 of the charter-party. In my view the Admiralty Court has no jurisdiction to arrest ships or to keep ships under arrest for that purpose; it only has jurisdiction to arrest ships and keep ships under arrest for the purpose of providing security for a judgment of the Court. Bail in an Admiralty action in rem represents the res, and it follows, in my view, that the Admiralty Court has no jurisdiction to require bail as a condition of release, or to maintain that bail, for the collateral purpose to which I have referred.

But the law as stated by Justice Brandon in *The "Cap Bon"* was changed with the introduction of s. 26(1) of the Civil Jurisdiction and Judgments Act 1982 which enacts as follows:

> 26.(1) Where in England and Wales or Northern Ireland a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another part of the United Kingdom or of an overseas country, the court may if in those proceedings property has been arrested or bail or other security has been given to prevent or obtain release from arrest –

(a) order that the property arrested be retained as security for the satisfaction of any award or judgment which –

(i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed; and

(ii) is enforceable in England and Wales or, as the case may be, in Northern Ireland; or

(b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.

(2) Where a court makes an order under sub-section (1), it may attach such conditions to the order as it think fit, in particular conditions with respect to the institution or prosecution of the relevant arbitration or legal proceedings.

(3) Subject to any provisions made by rules of court and to any necessary modifications, the same law and practice shall apply in relation to property retained in pursuance of an order made by a court under subsection (1) as would apply if it were held for the purposes of proceedings in that court.

Prior to the amendment of our Courts of Judicature Act 1964 on 22 May 1987, the Malaysian High Court's admiralty jurisdiction could have been invoked to arrest a vessel for the purpose of obtaining security for the satisfaction of an award which may be given in an arbitration. The old wordings of s. 24(b) of the Courts of Judicature Act 1964 bears this out clearly which enacts in sweeping terms that the Malaysian High Court has *"the same jurisdiction and authority in relation to matters of admiralty as is for the time being exercisable by the High Court of Justice in England"* and consequently, s. 26 of the Civil Jurisdiction and Judgments Act 1982 would have become part of the Malaysian law. But when Parliament amended our Courts of Judicature Act 1964, it deleted the sweeping terms and substituted in its place the specific words that the Malaysian High Court has *"the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981"*.

Parliament in its wisdom in amending our Courts of Judicature Act 1964 as alluded to earlier saw it fit to limit the use of the admiralty jurisdiction of the High Court. It is now apparent that the admiralty jurisdiction of the Malaysian High Court is confined to the purposes that the admiralty jurisdiction conferred on the High Court of Justice in England by the Supreme Court Act 1981 can be used and that jurisdiction is found in ss. 20 to 24 of the Supreme Court Act 1981 under the heading "Admiralty jurisdiction". A

reading of ss. 20 to 24 of the Supreme Court Act 1981 shows that there is no power included therein for the High Court to arrest a vessel as security for the satisfaction of an award that may possibly be granted in an arbitration. That power, as I have illustrated, emanates from the provisions in another statute, namely the Civil Jurisdiction and Judgments Act 1982. At the time our Parliament amended our Courts of Judicature Act 1964, the Civil Jurisdiction and Judgments Act 1982 had already been passed in England and this fact must surely have been known to our Parliament – after all Parliamentarians are wise people voted by the people. The question that begs to be answered would be this: Did Parliament wish for the Malaysian High Court's jurisdiction to be exercised for this purpose? The answer would certainly be in the negative. Two reasons may be advanced. Firstly, had Parliament not amended our Courts of Judicature Act 1964 then Civil Jurisdiction and Judgments Act 1982 would have been applicable by virtue of the "sweeping terms" employed in the old s. 24(b) of the Courts of Judicature Act 1964. Secondly, at the time the amendment to our Courts of Judicature Act 1964 was tabled before Parliament, the Civil Jurisdiction and Judgments Act 1982 was already in force in England and if Parliament had intended it to apply in Malaysia, it could have expressly stated so. In my considered view, by making specific reference to the admiralty jurisdiction in the Supreme Court Act 1981, the irresistible inference is that our legislature intended to exclude the operation of the Civil Jurisdiction and Judgments Act 1982 and consequently, limit the use of the Malaysian High Court's jurisdiction to the matters provided in ss. 20 to 24 of the English Supreme Court Act 1981. That being the case, the law in Malaysia would be that as stated in the case of *The "Dong Moon"* [1979] 1 MLJ 152. The facts in that case may be stated briefly as follows. The plaintiffs had arrested the Dong Moon in the Port of Penang and the plaintiffs claim against the defendants was for the sum of USD89,951.27 alleged to be for charter hire advances, supply of goods, services and disbursements in respect of a sister ship by the name of Dong Moon No. 3. Under cl. 17 of the time charter between the parties, it was agreed between them that all disputes should be referred to arbitration in Hong Kong. The defendants made an application to the High Court for a stay of the proceedings and for the ship to be released from arrest. Arulanandom J in his judgment at p. 153 said:

> It is not disputed that under clause 17 of the time charter between the parties it was agreed between them that all disputes should be referred to Arbitration in Hong Kong.
>
> Clause 17 of the time charter reads as follows:
>
> 17. That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons at Hong Kong one to be appointed by each of the parties hereto, and the third by the two so

chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award this agreement may be made a rule of the court. The Arbitrators shall be commercial men.

The plaintiffs submit that these are claims which refer to *"Dong Moon"* which are not covered by the agreement. The court must indeed take a very unsympathetic if not a critical view of the plaintiffs, who when they arrested the ship alleged that the defendants were indebted to them in relation to the *'Dong Moon No. 3'* and who when faced with the arbitration clause in the time charter now state that other claims are added.

Under section 6 of our Arbitration Act the court has powers to stay proceedings when in its opinion there is no sufficient reason why the matter should not be referred in accordance with the arbitration clause.

Further down the same page, Arulanandom J continued:

Counsel for defendants also addressed the court on the fact that this was a submission to arbitration made in pursuance of an agreement to which the protocol applies. The parties were from Hong Kong and Korea and under section 4(2) of the English Arbitration Act, 1950, unless there are certain reasons why stay should not be granted stay of proceedings must be granted.

At the last paragraph of p. 153 spilling over to p. 154, Arulanandom J tersely said:

The First Schedule to the English Act sets out the 'Protocol on Arbitration Clauses signed on behalf of His Majesty at a meeting of the Assembly of the League of Nations held on the twenty-fourth day of September, Nineteen hundred and twenty-three' (see *Halsbury's Statutes of England*, Third Edition, page 466).

The List of States which have signed and ratified the Protocol is set out in *Russell on Arbitration*, Eleventh Edition, at page 454. In the list appears United Kingdom and Japan [(including Chosen (Korea))].

I am therefore of the view that the stay of proceedings should be granted to the defendants.

Finally, Arulanandom J turned his attention to the question of whether there should be unconditional release of the ship and in this regard his Lordship referred to the decision of Justice Brandon in *The "Golden Trader"* [1974] 1 Lloyds Report 383, and this was what Arulanandom J had to say:

Then later on Justice Brandon (at page 385) goes on to state:

The starting point, if *The Cap Bon* ([1976] 1 Lloyds Report 543) is right, is that the court can only retain the security to satisfy a judgment or a compromise in the action itself. It follows that, if the court stays the

> action, so that there will, in all probability at least, be no judgment or compromise in the action to be satisfied, it must then release the security. Putting it shortly, if here is a stay, there must, as a necessary consequence, be a release. In cases where the grant of a stay is discretionary, the court can refuse a stay unless alternative security is provided. The defendant then has to choose between having a stay subject to a term for the provision of such security and not having a stay at all. If he chooses the former, then, subject to his complying with the term, he gets both a stay and release; if he chooses the latter, he gets neither. By contrast, in protocol arbitration cases, where the grant of a stay is mandatory, the court cannot refuse a stay unless alternative security is granted. It is bound to grant a stay in any event, and, since release is a necessary consequence of a stay, it is bound also to grant a release.
>
> The words of Justice Brandon seem to be equally applicable to the case before this court. It is thus the view of the court that the defendants are entitled not only to an unconditional order for a stay but also to an unconditional order for the release of the vessel.

In my considered view, the law in Malaysia is this. That a vessel like Normar Splendour cannot be arrested as security for an award which may be made in an arbitration. Where there is an arbitration clause, like the present case, then in the words of Justice Brandon in *The "Golden Trader" [supra]*, "the court cannot refuse a stay unless alternative security is granted." Clause 41(c) of the Time Charter Party as exhibited in exh. "A-1" at p. 8 of encl. 23 states as follows:

> 41(c) Notwithstanding the foregoing, but without prejudice to any party's right to arrest or maintain the arrest of any maritime property, either party may, by giving a written notice of election to the other party, elect to have any such dispute referred to the arbitration of a single arbitrator in London in accordance with the provisions of the Arbitration Act, 1950, or any statutory modification or re-enactment thereof for the time being in force.

and it is certainly an "arbitration agreement" within the meaning of s. 2(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("the Convention Act"). Section 2(1) of the Convention Act defines an "arbitration agreement" as "an agreement in writing, including an agreement contained in an exchange of letters or telegrams, to submit to arbitration present or future differences capable of settlement by arbitration." Section 6(1) of the Convention Act enacts as follows:

> 6(1) If any party to an arbitration agreement to which the New York Convention applies, or any person claiming through or under him commences any legal proceedings in any court against any other party to the agreement or any person claiming through or under him in respect

> of any matter agreed to be referred to arbitration in such agreement, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

whereas s. 1(1) of the English Arbitration Act 1975 enacts in similar vein as follows:

> 1(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

and Mr. Justice Brandon in *The "Rena K"* [1978] 1 Lloyd's Law Reports 545, 552 aptly said:

> The Act was passed to give effect to the New York Convention on the Recognition and Enforcement of Arbitral Awards. It is an essential preliminary to the recognition and enforcement of arbitral awards that the arbitration agreements capable of resulting in such awards being made should themselves first be recognised and enforced. Section 1 of the 1975 Act, giving effect to paragraph 3 of article II of the Convention, compels the recognition and enforcement of Convention (*ie*, non-domestic) arbitration agreements by requiring a Court, except in certain specified cases, to stay any legal proceedings brought in respect of a matter referred to arbitration under such an agreement.

On similar terms, I did say the following in *Concord Line Co Ltd v. The Owners Of The Ship "Molly"* [1997] 4 CLJ Supp 285 especially at p. 305 to p. 306:

> In my judgment, the words 'shall make an order staying the proceedings' appearing in section 6(1) of the Convention Act are clear. It means that the stay is mandatory (*The 'Rena K' [supra]*; and *The 'Vasso' (formerly 'ANDRIA')* [1984] 1 Lloyd's Law Reports 235) so long as the defendant files a qualified bail bond. To construe otherwise would be to denude and pay (lip) service to the clear words found therein. In *Radio Publicity (Universal) Ltd v. Compagnie*

Luxembourgeoise de Radiodifusion [1936] 2 ALL ER 721 at 727 it was said that such words gave no discretion to the court and the court was bound to order a stay. A passage appearing in the textbook entitled '*The Law and Practice of Commercial Arbitration in England,*' second edition by Sir Michael J. Mustill and Stewart C. Boyd at page 8 merits reproduction. It is this:

> ... once called upon by the defendant to do so, the Court is obliged to stay the action, however obvious it may seem that on the grounds of efficiency, economy and convenience the particular dispute is better suited for disposal by a trial in court rather than by arbitration.

In the present case, the arbitration agreement as alluded to earlier cannot be said to be a domestic arbitration agreement within the meaning of s. 6(3) of the Convention Act. The plaintiff hails from Singapore while the defendant comes from Norway and the parties have agreed to refer the disputes for arbitration in London. All these States are contracting States under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). That being the case, using Arulanandom J guidelines in *The "Dong Moon"*, this court is certainly empowered to grant an unconditional order for a stay and an unconditional order for the release of the vessel since this court's jurisdiction cannot be used to maintain the arrest as security for arbitration. It is pertinent to note that there is no provision in the Convention Act which empowers the court to stay proceedings on condition that security is given for the satisfaction of any award which may be given in the arbitration proceedings.

The position would be like this. If the court cannot maintain the arrest as security for arbitration, it becomes clear that the vessel should not in the first place be arrested as security for satisfaction of an award that may be made in arbitration. Clause 41(d) of the Time Charter Party as seen in exh. "A-1" of encl. 23 states:

> It shall be a condition precedent to the right of any party to a stay of any legal proceedings in which maritime property has been, or may be, arrested in connection with a dispute under this charter, that that party furnishes to the other party security to which that other party would have been entitled in such legal proceedings in the absence of a stay.

and in my judgment this very clause buries once and for all the plaintiff's claim for security. The language employed in cl. 41(d) of the Time Charter Party is quite clear. It is that security is to be paid only to the extent that the plaintiff "would have been entitled in such legal proceedings", and the defendant need not furnish any security to the plaintiff for the release of Normar Splendour since the plaintiff, had no right in the first place under Malaysian law, to arrest Normar Splendour when there was an arbitration clause. The principles of law laid down in *The "Rena K" [supra]* must, in

my view, be read with the utmost caution because the principles enunciated therein are not applicable mutatis mutandis in Malaysia. It must be recalled that *The "Rena K", inter alia,* held that in cases where the vessel was arrested because the owner was financially unable to meet any award which may be made in arbitration, the court retained a discretion to maintain the arrest of the vessel. But in the present case, the vessel Normar Splendour was not arrested by the plaintiff for that purpose as their affidavit in support of obtaining a warrant of arrest did not make any reference to such purpose nor produce any evidence of the defendant's financial incapacity. Thus, if there was such an evidence at the time of the issuance of the warrant of arrest, the arrest would have been proper since any stay of proceedings in the action may not be final and the stay of action may be removed if the owner was unable to satisfy the arbitration award and the plaintiff could have proceeded to a judgment in rem in this action. But alas, this was not the case here. So, since the plaintiff's arrest of the vessel Normar Splendour was, in the first place, wrongful this court would take this fact into account in adjudicating encl. 41.

In my judgment, the arrest of the vessel Normar Splendour by the plaintiff was done without disclosing to the court that the Time Charter Party had a provision to refer disputes to arbitration. This non-disclosure was indeed material and, consequently, the entire proceedings can be described as vexatious and an abuse of the process of the court. In the same vein, Lord Justice Robert Goff in *The "Vasso" (formerly "Andria")* [1984] 1 Lloyd's Law Reports 235 when delivering the judgment of the Court of Appeal had this to say at p. 242 of the report:

> However, on the law as it stands at present, the court's jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, for example, arbitration proceedings. The time may well come when the law on this point may be changed: see section 26 of the Civil Jurisdiction and Judgments Act, 1982, which has however not yet been brought into force. But that is not yet the law. It follows that if a plaintiff invokes the jurisdiction of the Court to obtain the arrest of a ship as security for an award in arbitration proceedings, the Court should not issue a warrant of arrest. Of course, if the plaintiff fails to reveal that arbitration proceedings are being actively pursued and that his purpose is to obtain security for an award in those proceedings, the Court may inadvisedly issue a warrant. But for a plaintiff so to proceed may be vexatious and an abuse of the process of the Court. Not only has he failed to disclose material facts to the Court on an *ex parte* application; but he has actively pursued proceedings in Court at the same time as actively pursing arbitration proceedings, which is (unless the plaintiff is seeking, on appropriate evidence, security in the action on the principle in *The Rena K*) vexatious. If so, the Court may, on learning of the material facts, order

> the release of the ship from arrest; and may order the discharge of any security provided consequent upon the arrest.

At the local scene, Shaik Daud J (now JCA) in the case of *The "Vinta"*, an unreported judgment *vide* Civil Suit no: D1-27-11-93, said:

> I am not sure if the English Civil Jurisdiction And Judgments Act 1982 applies or not but it seems to me that even if it does not, our courts ought to take cognisance of changes in the law in England especially when we do not have our own on the particular subject matters to speak of. In the light of our section 24 Courts of Judicature Act 1964 I feel that the 1982 English law ought to be followed.

and being dissatisfied, the owners of the vessel appealed against this decision and the Supreme Court (Tan Sri Harun Hashim, Dato' Peh Swee Chin, Tan Sri Eusoff Chin) allowed the appeal. Unfortunately, no written judgment was handed down by the Supreme Court. But one thing was certain. In overruling the High Court's decision, one can only surmise that the admiralty jurisdiction of the High Court cannot be invoked to arrest a vessel as security for an award that may be made in arbitration proceedings.

I have scrutinised the available evidence and the law thereto and I have concluded that:

(i) there was no necessity for the defendant to return the vessel Normar Splendour to the port of Pasir Gudang to purge the contempt committed by the master since the arrest of Normar Splendour for the purpose of obtaining security for an award to be made in arbitration proceedings was an improper exercise of the court's admiralty jurisdiction;

(ii) the conduct of the plaintiff in failing to make full and frank disclosure when applying *ex parte* for the warrant of arrest of Normar Splendour must be taken into account when deciding the appropriate manner in which the contempt committed by the master of the vessel was to be purged, and this was my judgment and I so hold accordingly.

Merits Of The Defendant's Case

I will now proceed to examine the history behind the vessel Normar Splendour as it will definitely assist the court in adjudicating encl. 41.

The vessel Normar Splendour was previously owned by Dublin Shipping. The plaintiff was initially interested in acquiring the vessel and the plaintiff was offered to purchase it at USD4.7 million. The plaintiff agreed to purchase the vessel at that price subject to obtaining the necessary approval from its board of directors. The plaintiff through its agent, RNA Shipping, contacted the

defendant's shipbroker by the name of R.S. Platou (Singapore) Pte Ltd to locate a sub-purchaser who would purchase the vessel from the plaintiff at approximately USD5.2 million and charter back the vessel to the plaintiff for a period of three years. RNA Shipping further informed RS Platou that the plaintiff had thoroughly inspected the vessel and found that the vessel was suitable for use in their trade. The defendant, when informed of the plaintiff's intentions, proposed to purchase the vessel at the same price paid by the plaintiff to Dublin Shipping and the defendant put a condition to the effect that the plaintiff would charter the vessel from the defendant for a period of three years thereafter. Events showed that the sale of the vessel did not go through between the plaintiff and Dublin Shipping because the plaintiff could not obtain the approval of its board of directors.

RNA Shipping then enquired of the defendant whether the defendant would be interested in buying the vessel directly from Dublin Shipping and thereafter chartering it to the plaintiff for a period of three years. The defendant agreed to this proposal and acquired the vessel from Dublin Shipping on the strength of the plaintiff's agreement to charter it at USD6,100 per day for the first year and an increase of USD100 for each subsequent year in that three year charter party. Soon thereafter the plaintiff and the defendant entered into a charter party contract codifying this agreement.

It must be emphasised that the plaintiff was interested to purchase the vessel initially and had in fact inspected the vessel thoroughly and had come to the conclusion that it was suitable for use in the plaintiff's trade. Jeremy Liddel of Essex, United Kingdom in his affidavit in encl. 50 at para. 6 adverted to all these and this was what he deposed:

> 6. I wish to add further for purposes of clarification, Portshire Ltd. was engaged in the following capacities:
>
> (a) as co-brokers with RNA Shipping in selling the vessel 'Rathmoy' by Dublin Shipping to the Plaintiffs. That transaction did not proceed to completion because the Plaintiffs did not get their board approval (which I understand funding was not made available by the Plaintiffs' shareholders to buy the vessel).
>
> (b) After the failed transaction in (a) above, the Plaintiffs (through RNA Shipping) attempted to find a third party to buy the vessel and charter it to the Plaintiffs. In that respect the Defendants became interested and proceeded to negotiate for the purchase of the vessel against the charter to the Plaintiffs. The Defendants were represented by R.S. Platou Singapore Pte Ltd as their broker. Both the time charter to the Plaintiffs and the sale of the vessel were co-brokered between RNA Shipping, Portshire and R.S. Platou Singapore Pte Ltd. I am personally aware that the Plaintiffs had inspected the vessel through Mr. Thomas Cheok and had purchased the vessel subject to board

> approval. I am aware that the Plaintiffs had been made clear that the Defendants were not familiar with the performance of the vessel and that the Defendants were only willing to make a final time charter performance description after the vessel was used for 6 months by the Plaintiffs. This is commonly done in time charter cases and in this case pursuant to the terms of the charter party, where vessels are acquired for the specific purpose of the charterer. Furthermore, all parties were aware that the Plaintiffs had originally selected this particular vessel from a number of market vessels and had in fact performed a thorough inspection of the vessel and found it suitable for their trade and in fact acquired the vessel on the basis of their inspection. I find it surprising that the Plaintiffs should complain about the performance specifications especially since they had select-ed the vessel as being suitable for their own use.

and this was not challenged by the plaintiff at all. What Jeremy Liddel deposed must be the truth and nothing else. It was for these reasons that the defendant refused to give to the plaintiff any performance guarantee in respect of the vessel for the first six months of the charter because the defendant relied solely on the fact that the plaintiff had concluded that the vessel was suitable for use in the plaintiff's trade. It was for these reasons also that cl. 46 of the Time Charter Party clearly stated that the speed and consumption figures stated therein was "for guidance only during the first six months." The charter party contract also provided that these figures were "to be completed based on actual speed and consumption measured during first six months". All these facts can readily be seen in paras. 14 to 19 of encl. 44.

Things did not proceed as smoothly as one would expect. RNA Shipping informed RS Platou that the plaintiff was losing money on the vessel and requested for a reduction of the charter rate. When the defendant refused to accede to the plaintiff's request, the plaintiff became vindictive and tried, by hook or crook, to get out of the charter. This soured the relationship between the two. Ultimately the plaintiff repudiated the charter purportedly on the ground that the vessel was not performing according to the charter description. The defendant did not accept this and proceeded to deliver the vessel to the plaintiff but the latter refused to accept delivery of the vessel. The defendant had no choice and was compelled to claim that the plaintiff had committed a repudiatory breach of the charter party. It seemed that the defendant had tried its level best to mitigate the loss as best as possible prior to the vessel's arrest by negotiating other employments for the vessel.

In essence, the dispute between the plaintiff and the defendant hinged on the plaintiff's claim that the plaintiff was entitled to repudiate the charter party on the basis of the vessel's performance. According to the plaintiff, there were

differences between the guidance figures stated in the contract and the actual figures and this, according to the plaintiff, amounted to a breach of condition which entitled the plaintiff to repudiate the contract. The hollowness of the plaintiff's claim to repudiate the contract can be seen when one considers that it was the plaintiff who had inspected the vessel Normar Splendour, tried to purchase the vessel and subsequently chartered the vessel because it was suitable for the plaintiff's trade. As stated earlier even the figures on speed and consumption were for guidance purposes only and the defendant was prepared to give a performance guarantee after the first six months of the charter. In my judgment, the words "for guidance purposes only" made it abundantly clear that it was never meant to be a condition of the contract and since it was not a condition of the contract then the plaintiff had no legal basis whatsoever to repudiate the contract on the ground that the vessel's performance did not meet the figures that was stated in the contract. The conclusion would be irresistible and only one conclusion can be arrived at, and that was that the plaintiff had voluntarily bound itself to a three year contract and subsequently the plaintiff had second thoughts about it. This court will not sanction the behaviour of the plaintiff. It was a mere ploy on the part of the plaintiff and certainly the plaintiff cannot be allowed to play the innocent by hiding behind these contempt proceedings. To illustrate the plaintiff's attempt to extricate from the charter party, reference should be made to the affidavit of Ole Zimmerman Borresen in para. 36 of encl. 44 where he deposed that:

> 36. Para 18 to 22 of the 2nd Cheok's affidavit are argumentative. There must be differences between guidance figures and actual figures. As stated earlier, the Plaintiffs knew the vessel better than the Defendants because the Plaintiffs had wanted to buy the vessel themselves and spent time on board the vessel performing inspection. There is no point in arguing what are 'ridiculously low speeds or consumptions' except by reference to arbitration. The inconsistencies at the first few voyages were rectified. The Plaintiffs never attempted to cancel the charterparty when such claims of deficiencies first occurred (which is denied). In any event, even assuming that there are differences (which is denied), such terms are innominate terms. Whether the Plaintiffs can terminate the charterparty depends on the severity of the consequences of the breach. As these figures for speed and consumption can only be fixed after a 6 month guidance period, how can the Plaintiffs on their own assessment determine that these figures are the absolute figure for which the charterparty is based on? It does not justify termination when its for guidance purposes only. If at all there is a deviation, I do not see how the Plaintiffs cannot be compensated for the difference in costs arising therefrom (which is denied) which is clearly the custom of the trade. There were substantial exchange of views prior to the alleged repudiation of the charterparty by the Plaintiffs. I verily believe that this cause of action by the Plaintiffs was to extricate

themselves from the charterparty with a view of reducing their losses arising from the falling market of charterparty whereas the proper cause of action would be for them to refer such matters to arbitration. The alleged claims for loss of profits are substantially higher than the claim for the loss due to deficiencies of the specifications and consumption figures. This goes to show that the Plaintiffs have brought the losses on themselves (which is denied) and could have very easily averted such claims (or made this wrongful arrest of vessel totally irrelevant) by referring to arbitration for the claims related to vessel performance.

Indeed there was a serious dispute between the plaintiff and the defendant and that dispute ought to be referred to arbitration in accordance with the arbitration agreement. It is pertinent to point out that the plaintiff has shown its true colours, so to speak, by inflating the alleged claim. Prior to the arrest of the vessel Normar Splendour, the plaintiff's claim for alleged damages was approximately USD230,000 as can be seen from their undated letter at exhibit "A-2" of encl. 23. The defendant disputed the alleged claims by the plaintiff and through the defendant's solicitors Messrs Evensen & Co, the defendant answered in detail those alleged claims. Incidentally, Messrs Evensen & Co's letter dated 24 April 1997 can be seen in exh. "A-3" of encl. 23. Later, the plaintiff's claim for alleged damages skyrocketed to approximately USD 1 million as evident from the plaintiff's solicitors letter dated 17 November 1997 which can be seen in exh. "A-27" of encl. 23. For these factual reasons, it was my judgment that it would cause grave injustice to the defendant if this court were to allow encl. 41.

The Possible Penalties For Contempt Of Court

Mr. Clarence Edwin submitted that the defendant was not the party who committed the contempt and there was no evidence to prove that the defendant conspired with the master or was privy to and assisted in the vessel Nomar Splendour breaking arrest but nevertheless, so submitted Mr. Clarence Edwin, the defendant was prepared to purge the contempt committed by the master in order to assuage the indignation of this court. What then would be the appropriate penalty which should be imposed by this court?

It must not be forgotten that a contempt of this nature attaches singularly to the person who committed the contempt and for other persons to be found guilty of the contempt, there must be evidence of participation in the contemptuous act (*The Petrel [supra]*). It goes without saying that any person breaking arrest or interfering with the property whilst that property is under arrest is guilty of contempt and, in law, liable to committal or a fine. But to say that the contempt can only be purged by bringing the vessel Normar Splendour back to the port of Pasir Gudang is a proposition devoid of any judicial authority.

The general trend of the authorities disclose that the courts will order either a committal or impose a suitable fine. The authorities, however, preferred the sentence of a fine rather than committal in cases where there are extenuating circumstances. Extenuating circumstances prevailed in *The "Merdeka" [supra]*; *The Jarlinn* [1965] 3 All ER 36; *The Abodi Mendi* [1938] Probate Division 178; *The Seraglio* [1885] 10 Probate Division 120; and *The Bure* [1850] 14 Jurist 1123 and the courts there did not commit the contemnors to jail. In the majority of these cases, the contempt was purged by the payment of a fine. To lay stress on the matter, reference to the judgment of Hewson J in *The Jarlinn [supra]* should be made and there his Lordship at p. 39 of the report had this to say:

> The motion is for an order to issue a writ of attachment against the master; alternatively, for an order that the master do stand committed to prison, an order for costs, and for such further or other order as the nature of the case may require. This court in considering matters of this kind must have regard to all the circumstances both for and against the contemnor. The court is not bound either to attach or commit, but, if there is a proper case, let it be understood that it will not hesitate to do so. In previous cases it has on one or two occasions imposed a fine *in lieu* of imprisonment, and there is no doubt in my mind that it may still do so. I am told by counsel for the Official Solicitor that the costs of the Official Solicitor amount to something in the neighbourhood of 240 pound. It has been suggested that, should I be considering a fine, I should lump the costs and fine together as a fine and make no order as to costs. In the circumstances of this case that seems to me a very sensible suggestion. After giving this matter consideration I am proposing to impose a fine in the sum of 300 pound, which will include the costs of the Official Solicitor. In those circumstances there will be no order as to costs.

In my judgment, this was a fit and proper case for this court to impose a fine. The plaintiff should not be entitled to the orders sought for in encl. 41 because the circumstances of this case did not merit nor warrant this court to grant those draconian orders.

Now, what would be the appropriate quantum of a fine for a civil contempt which this court should impose for the present case. But before embarking on this enquiry, it is germane to mention that in assessing the amount of the fine, this court must take into account the seriousness of the contempt. However, the severity of the contempt will be mitigated by certain factors. As Megaw P observed in the case of *Re Agreement Of The Mileage Conference Group Of The Tyre Manufacturers' Conference, Ltd* [1966] 2 All ER 849, 862:

> Questions as to the *bona fides* of the persons who are in contempt, and their reasons, motives and understandings in doing the acts which constitute the contempt of court may be highly relevant in mitigation of the contempt. *Bona*

> *fide* reliance on legal advice, even though the advice turns out to have been wrong, may be relevant, and sometimes very important, as mitigation. The extent of such mitigation must, however, depend on the circumstances of the particular case, and the evidence adduced.

and using this as a guideline, I will now proceed to examine the mitigating factors in favour of the defendant.

The master of the vessel Normar Splendour by the name of Captain Yury Romanyuga (the name volunteered by Mr. Clarence Edwin) was quite frank. He maintained that the conditions on board the vessel had deteriorated to such an extent that he felt compelled to take matters into his own hands. To him, the anxious and aggravated crew members might cause him bodily harm. To this extent the master's story was corroborated by an independent third party, namely Captain Datuk Hamzah bin Mohd Noor who actually witnessed the sorry state of affairs on board the vessel. There was insufficient food and drinking water on board the vessel Normar Splendour and this fact was further exacerbated by the fact that some of the crew members who were Muslims found it difficult if not impossible to observe religious requirements during the month of Ramadan. It was during the month of Ramadan that these extreme conditions prevailed on board the vessel Normar Splendour. All these were extenuating factors which went a long way to mitigate the contempt committed by the master.

Mr. Jainil Bhandari submitted that although mitigating factors ought to be taken into account in assessing the fine to be paid by the contemnor yet the wilful disobedience of an order of the court and the continuing state of contempt would reduce the sting of the mitigating factors into oblivion. Reliance was placed on the decision of KL Rekhraj JC (now Judge) in the case of *Anthony Ratos s/o Domingos Ratos v. City Specialist Centre Sdn Bhd (t/a City Medical Centre) (Attorney General, Intervener)* [1996] 3 MLJ 349, particularly at p. 360 where his Lordship remarked:

> This court repeats that for the future, where the contempt is grave – as in this case – no fine will do, as the haughty and well to do contemners will scornfully throw their money in the face of the court and get away without the least degree of remorsefulness and compunction. Let the contemnors be warned that imprisonment shall be the order of the day. The courts will no longer be moved by mitigating circumstances.

A submission was also advanced to the effect that in assessing the fine for contempt, this court must also take into account the damage done to the public interest in addition to the seriousness of the contempt (*Chung Onn v. Wee Tian Peng* [1996] 5 MLJ 521, a decision of Low Hop Bing J where his Lordship cited favourably the decision of Megaw P in *Re Agreement of the*

Mileage Conference Group of the Tyre Manufacturers' Conference Ltd [1966] 2 All ER 849 at p. 862). But in the context of the present case, one must not forget that the contemnor was the master of the vessel Normar Splendour and not the defendant. As I said the defendant was prepared to purge the contempt of the contemnor.

It was the stand of Mr. Jainil Bhandari that for serious contempts, imprisonment should be vigorously applied and he submitted that the courts have imposed custodial sentences either in addition to or *in lieu* of imposing a fine. He conceded that since the contemnor, referring no doubt to the master of the vessel Normar Splendour, was beyond the jurisdiction of this court then the only way for this court to mete out appropriate punishment for a serious contempt would be to impose a stiff fine. I am acutely aware that the courts have imposed stiff fines in the following cases:

(i) In *United Malayan Banking Corp Bhd v. Chuah Gim Suan*, *Mallal's Digest of Malaysian and Singapore Case Law*, 4th edn, 1998 reissue, vol. 2(1), Abdul Hamid Mohamed J imposed a fine of RM10,000 against the defendant for avoiding service.

(ii) In *MBf Holdings Bhd & Anor v. Houng Hai Kong & Ors* [1995] 1 MLJ 135, Anuar J (as he then was) sentenced the first defendant to two weeks' imprisonment and fined RM20,000 in default six months' imprisonment whereas the third defendant was sentenced to two years imprisonment. Both these two defendants were convicted for disobeying a restraining order and for evading service.

(iii) In *Anthony Ratos [supra]*, KL Rekhraj JC (now Judge) imposed a fine of RM10,000 each on the contemnors and his Lordship stated that he would have imprisoned them if not for the timely intervention of the Attorney General who pleaded that the contemnors had repented and apologised to the court at the earliest possible moment.

(iv) In *Chung Onn v. Wee Tian Peng [supra]*, Low Hop Bing J imposed a fine of RM7,000 on the contemnor after taking into consideration certain extenuating circumstances, namely:

(1) that there did not appear to be any flagrant challenge to the court's authority;

(2) that the contemnor had done everything in his power to purge the contempt and revert back to the *status quo*; and

(3) that the contemnor was not in a continuing state of contempt.

(v) In *Heatons Transport (St. Helens) Ltd v. Transport and General Workers' Union* [1973] AC 15, Sir John Donaldson P imposed a further and substantial fine of 50,000 pound when the defendants failed to obey an interim order from the National Industrial Relations Court despite being fined earlier on in the sum of 5,000 pound for contempt.

(vi) In *Goad v. Amalgamated Union of Engineering Workers (Engineering Section)* [1972] ICR 429, the court imposed a fine of 50,000 pound on the union for its continuing disobedience of the order of the court in regard to Goad's access to branch meetings.

Mr. Jainil Bhandari submitted that the contempt in the present case was far more serious as there was a blatant and deliberate breach of a court order. That breach, so it was submitted, was further aggravated by the defendant's (and not the master's) acts of perpetuating the contempt by continuing to trade the vessel whilst the warrant of arrest was still subsisting. Mr. Jainil Bhandari even went to the extent of submitting that the defendant had not shown any remorse at all for the contempt that was committed by the master of the vessel Normar Splendour.

Mr. Clarence Edwin implored this court to impose a token or a nominal fine on the defendant as there were extenuating circumstances on board the vessel Normar Splendour and he further submitted that the imposition of a substantial fine would be tantamount to punishing the defendant. In rebuttal, Mr. Jainil Bhandari drew my attention to the following points:

(i) The existence of the extenuating circumstances on board the vessel Normar Splendour cannot be regarded as a **"mitigating factor"** in favour of the defendant because the defendant had blatantly neglected their own crew and turned a **"blind eye"** to the whole episode. It was submitted that the defendant was the sole architect of those extenuating circumstances and, consequently, the defendant should not be allowed to take advantage of their own folly.

(ii) The failure to bring the vessel Normar Splendour to the port of Pasir Gudang within the jurisdiction of the Malaysian courts was said to be a continuing breach of the warrant of arrest and a perpetuation of the contempt of court and on these grounds a stiffer fine was sought for.

(iii) The defendant's conduct after the vessel Normar Splendour broke arrest was hardly that of a contrite party who was genuinely sorry for the contempt committed by the master.

All in all, Mr. Jainil Bhandari submitted that there was a dire need to protect the sanctity of the court order and to safeguard the public interest and for these reasons he suggested that this court imposed a fine in the region of RM150,000.

In a nutshell, the submissions of Mr. Jainil Bhandari may be summarised as follows: that the defendant being in a continuing state of contempt for its failure to return the vessel Normar Splendour to the port of Pasir Gudang and the defendant being the author of the extenuating circumstances on board the vessel prior to the vessel breaking arrest, should not be allowed to plead any mitigating factors but should be dealt with severely by way of a stiff fine. But, with respect, these submissions must be read in the context that the defendant did not carry off the vessel Normar Splendour, so to speak, nor was the defendant privy to and assisted in the master's contemptuous act. It was my judgment and I so hold that the plaintiff had the burden of proving beyond a reasonable doubt that the defendant either carried off the vessel Normar Splendour or that the defendant was privy to and assisted in the master's act. Without a doubt, it was my judgment that the plaintiff had failed to discharge that burden. That being the case, the contempt committed by the master of the vessel Normar Splendour remained a contempt committed by him and him alone. No one else was involved. Thus, in assessing the quantum as to how much the master of the vessel should be fined for contempt, the various mitigating factors alluded to in the early part of this judgment in favour of the master must be brought forth and put into motion. I wholeheartedly agree with Mr. Clarence Edwin when he submitted that the defendant was not pleading mitigation for a contempt committed by the defendant but rather a contempt committed by the master of the vessel Normar Splendour.

In my considered view, the extenuating circumstances on board the vessel was a mitigating factor to be considered by this court and this was the same approach that was adopted by the courts in *The Merdeka [supra]* and *The Jarlinn [supra]*. To say that the defendant had orchestrated the conditions on board the vessel Normar Splendour was not only untenable but it was quite mischievous. It was also fallacious to submit that the defendant continued to be responsible for the well being of the crew despite the arrest of the vessel. Indeed the well being of the crew while the vessel was under arrest rested squarely on the shoulders of the plaintiff because the plaintiff had deposited a sum of RM15,000 with the sheriff for the maintenance of the vessel while she was under arrest at the port of Pasir Gudang. Furthermore, it was indeed mischievous to say that the defendant did nothing and had turned a **"blind eye"** to the adverse conditions on board the vessel. The truth of the matter was this : the defendant was not based locally and they were at the other end of the globe, yet the defendant engaged an independent third party in the

person of Captain Datuk Hamzah bin Mohd Noor to study the conditions on board the vessel and do the necessary to inform the relevant authorities in order to alleviate any adverse conditions on board the vessel Normar Splendour. Captain Datuk Hamzah bin Mohd Noor did not remain idle. He gave affidavit evidence to the effect that he met the sheriff on several occasions and had written to the authorities formally on the matter and the authorities have acknowledged receipt of those letters. That being the case, it was wholly without merit and against the grain of evidence when Mr. Jainil Bhandari argued that the defendant had turned a **"blind eye"** to the whole situation.

Be that as it may, an improperly obtained order of a court of law must be obeyed and not disregarded. It is not an excuse to disobey an order of court even though the order was obtained irregularly and improperly. Disobedience to an improperly obtained order of court will still constitute a contempt and, consequently, a party aggrieved by such an order should make the necessary application to the court for relief from complying with the order. Be that as it may, I wholeheartedly agree with Mr. Clarence Edwin and it was my judgment that the warrant of arrest was improperly issued in the present case and, consequently, the present proceedings in encl. 41 were vexatious and an abuse of the process of the court. To me, these would constitute another mitigating factor in favour of the defendant. It is instructive, at this juncture, to refer to the decision of the House of Lords in *Scott (Otherwise Morgan) And Another v. Scott* [1913] AC 417 HL. That was a case involving the breach of an order of the court that the case – a petition to annul a marriage on the ground of the respondent's impotence, be heard in camera. The petitioner retained a solicitor who on her instructions obtained a transcript of the proceedings, and the petitioner then sent copies of the proceedings to the respondent's father, sister and a third person. Aggrieved by the actions of the petitioner, the respondent then issued a notice of motion seeking the petitioner and her solicitor to be committed to prison. In the court of the first instance, the petitioner and her solicitor were found guilty of contempt and ordered to pay the costs of the motion. Both the petitioner and her solicitor appealed to the Court of Appeal who then dismissed the appeal. On further appeal to the House of Lords, the decision of the Court of Appeal was reversed and the House of Lords discharged the order of the court of the first instance. The House of Lords also ordered the respondent to pay the costs at all levels.

Viscount Haldane LC, with whom the Earl of Halsbury concurred, found that the order of the court of first instance that the cause to be heard in camera was in the first place an incorrect and an improper order and, consequently, the appellants (both the petitioner and her solicitor) were found not guilty of contempt. At p. 439 to p. 440 of the report, Viscount Haldane LC had this to say:

> My Lords, in my opinion the facts before Bargrave Deane J. fell short of what was requisite to justify departure from the principle which requires the hearing, in all but exceptional cases of the class I have indicated, to take place in open Court. No doubt the petitioner and the respondent preferred to give their evidence in private. But the evidence actually given was of a brief and simple character, and it might without difficulty have been tendered in open Court. In my opinion there was no valid reason for hearing the case in camera and the order was made in reality for the benefit of the parties who concurred in asking for it, and was therefore made under a mistaken impression as to the law. And if that be the substance of the matter it disposes of the appeal. The order was wrong, and it could not effect the abrogation of the *prima facie* right, excluded only in exceptional cases such as I have already spoken of, which the parties and the public possess to make known what takes place at the hearing and to discuss it.

Further down the same page of the same judgment, Viscount Haldane LC concluded in these words:

> I am, therefore, of opinion that the judgment of the Court of Appeal should be reversed and the order of Bargrave Deane J. discharged, and that the respondent should pay the costs here and in the Court below. I move accordingly.

Thus, it was clear that the House of Lords in *Scott's* case found that the appellants there were not guilty of contempt for the simple reason that the order that was made was wrongly made under a mistaken impression.

The next instructive case would be that of *Drewry v. Thacker* [1819] 3 Swans 528, at p. 963 where the court there held that on an application to enforce an order irregularly made, the court will give the respondent the benefit of the fact that the order was irregular. Lord Chancellor Eldon at p. 966 to p. 967 of the report had this to say in that case:

> The order made by the Master of the Rolls on the 24th of November for an injunction, was grounded on an affidavit of the administratrix, stating only that the creditors at law threatened to issue execution, and her belief that she had no assets adequate to pay them; but omitting all mention of the circumstances attending the action at law. I agree, that it is not an absolute rule of this court to refuse an injunction, unless there is an affidavit stating the assets in the hands of the personal representative; but I will never grant the injunction without using my best endeavours to know the state of the assets. In many cases those endeavours might fail to obtain the information sought; but if ever a case required it, it is one in which all these solemn engagements have passed before the application for an injunction. On a full explanation of the facts there might have been a difficulty in granting that application; the order, however, has been made, and must be obeyed: but on an application against persons guilty of a breach of it, the Court would forget its duty, if it did not give to them the benefit of the fact that the order ought not to have been made.

Now, since I have held that the warrant of arrest in this case was irregular then the master of Normar Splendour should be given the benefit of the fact that the order he disobeyed was irregular.

What would be the appropriate quantum to impose in so far as a fine would be able to purge the contempt of the master of Normar Splendour and payable by the defendant? This would be the nagging question that has to be answered. In assessing the appropriate fine to be imposed, it must be remembered that the defendant in undertaking to purge the contempt committed by the master cannot be classified as the contemnor. To say that the master must be fined in the region of RM150,000 which fine must be borne by the defendant would surely go against the grain of the principles relating to the imposition of a fine. Pedlow J in *Lee Yu Fah & Ors v. PP* [1937] MLJ Rep 171 succinctly said at p. 172 of the report:

> If a general principle can be laid down, I think it should be that a fine should seldom be so excessive as to ruin completely the people on whom it is imposed.

and the fact that the defendant was willing to pay the fine on the master's behalf made no difference at all to the application of this sound principle of law. The guiding principle would be whether the proposed fine to be imposed by this court would ruin the master.

It must be remembered that the adverse conditions on board the vessel must have caused members of the crew to become irate and hostile since they could not possibly be expected to fathom the legal process to which the vessel was subjected to. To the crew members, hope must have rapidly given way to despair as the days passed by with no news of the vessel's release. Fresh supplies of essentials to the vessel too were not made available. The arresting authorities too did not enquire as to the well being of the master and the crew. In my judgment, the compulsion which led the master and the crew to break arrest cannot be dismissed as whimsical as this was the distinguishing feature that set this case apart from the other cases where there was a deliberate breach of an order amounting to contumacious conduct by a party to legal proceedings. In the present case, there was no contumacious conduct nor was there a deliberate breach of an order for personal profit or gain and these factors must be reflected in the amount of the fine which this court must impose.

In all the cases where the quantum of fines imposed by the courts were on the higher side, though they were probably appropriate in the circumstances of those cases, the facts therein were entirely different. In all those cases, there was a flagrant disregard of an order. It was not surprising that the fines were quite stiff as contumacy must be met swiftly with punishment which would

not only deter the particular offender but also deter potential offenders. The present case can hardly be classified as a case involving contumacious conduct. It is undeniable that this court must view a contempt seriously and mete out the appropriate punishment. But in so doing, this court is always mindful that justice must always be tempered with mercy. In wielding the sword of justice to uphold the letter of the law, this court must not be blind to the circumstances of the case but must tread cautiously lest it violates the spirit of the law. The master of Normar Splendour – Captain Yury Romanyuga was guilty of contempt and the defendant wished to purge the contempt committed by the said Captain. I am not inclined to impose an exorbitant fine. The extenuating circumstances alluded to in the early part of this judgment should operate to reduce the amount of the fine. In *The "Merdeka"*, Mr. Justice Sheen imposed a fine of 350 pound and the extenuating circumstances found in that case paled into insignificance in comparison to the facts of the present case. At the present exchange rate for 8 September 1999 as set out in the NST index, the fine of 350 pound in *The "Merdeka"* would turn out to be approximately RM2,150. The present exchange rate would be as follows: 0.1630 pound equals RM1 as at 8 September 1999. It must be borne in mind that *The "Merdeka"* was decided in 1982 and it must also be remembered that the warrant of arrest in the present case was irregular and so a fine of RM2,150 should be the appropriate quantum to be imposed and the defendant must pay this amount in order to purge the contempt of the master of Normar Splendour. In *The Jarlinn [supra]*, Hewson J imposed a fine of 300 pound which included the costs of the Official Solicitor which his Lordship estimated at 240 pound. In other words, Hewson J merely imposed a fine of only 60 pound in that case.

Can A Master Be Vicariously Liable For A Criminal Act Committed By His Servant?

As I said in the early part of this judgment that the distinction between civil and criminal contempt has become obsolete. Even though it is a "meaningless classification" (*Jennison v. Baker [supra]*), the fact of the matter remains that the penal consequences which will be meted out to an offender requires the offence to be proved beyond a reasonable doubt. A civil contempt imports the principle on the determination of liability from the field of criminal law. In the case of *In re Bramblevale Ltd [supra]*, the registrar had ordered Mr. Hamilton (see p. 136 of Lord Denning MR's judgment):

> within seven days to produce to the liquidator and make available for inspection at Alma House, Rodney Road, Cheltenham the books of account and all similar papers and documents of the company to the liquidator.

and when Mr. Hamilton failed to comply with the court order, it was a civil contempt as it amounted to disobeying a court order and Lord Denning M.R. said that this contempt was "an offence of a criminal character."

In tort, a master is said to be liable for all the acts of his servant performed in the course of the servant's employment. In criminal law, however, a master is generally not vicariously liable for the criminal acts of his servant. In criminal law, for the master to be liable for the criminal acts of his servant, it must be shown that the act was committed by the servant upon the directive of the master. JC Smith and Brian Hogan, the co-authors of a book entitled *"Criminal Law"*, 6th edn, at p. 162 said:

> The doctrine of vicarious liability in tort developed in the early part of the eighteenth century, but it was made clear by the leading case of *Huggins* [1730] 2 Stra 883 that there was to be no parallel development in the criminal law.

The learned authors then proceeded to quote from the judgment of Raymond CJ in *Huggins* [1730] 2 Stra 883, as seen at p. 162 to p. 163 of the said book:

> It is a point not to be disputed, but that in criminal cases the principal is not answerable for the act of the deputy as he is in civil cases: they must each answer for their own acts, and stand or fall by their own behaviour. All the authors that treat of criminal proceedings proceed on the foundation of this distinction; that to affect the superior by the act of his deputy, there must be the command of the superior which is not found in this case.

Both the cases of *Stancomb v. Trowbridge Urban District Council* [1910] 2 Ch D 190 and *Re Supply of Ready Mixed Concrete (No: 2) Director General of Fair Trading v. Pioneer Concrete (UK) Ltd and another* [1995] 1 All ER 135 can easily be differentiated. In these two cases, no arguments were put before the courts there to show that there was no parallel development in criminal law along the lines of vicarious liability for tortious acts committed by a servant. Surprisingly, *Huggin's* case was not even cited in those cases during argument. Be that as it may, lest I be accused of an oversight the principles as enunciated in *Re Supply of Ready Mixed Concrete (No: 2)* can be gleaned from the decision of Lord Nolan at p. 156 and p. 157 of the report:

> Given that liability for contempt does not require any direct intention on the part of the employer to disobey the order, there is nothing to prevent an employing company from being found to have disobeyed an order 'by' its servant as a result of a deliberate act by the servant on its behalf. In my judgment, the decision in *Stancomb v. Trowbridge UDC* is good law and should be followed in the present case.

Earlier on at p. 142 of the report of the same case, Lord Templeman remarked:

> An employee who acts for the company within the scope of his employment is the company. Directors may give instructions, top management may exhort, middle management may question and workers may listen attentively. But if a worker makes a defective product or a lower manager accepts or rejects an order, he is the company.

Now, the learned authors Nigel Lowe and Brenda Sufrin in their book entitled *"The Law of Contempt"*, 3rd edn, at p. 570 and p. 571 were of the view that the principles enunciated by Lord Nolan in *Re Supply of Ready Mixed Concrete (No: 2)* were of general application and this was what they said:

> Assuming, as it is submitted it should be, that Lord Nolan's analysis is of general application, it now seems clear that corporate bodies will be considered to be in contempt if the terms of an injunction made against them are broken by a deliberate act of their agents or servants whilst acting within the course of their employment but regardless of whether the act in question was authorised or indeed expressly forbidden by the company. Their only defence is either that the acts in question were not deliberate but casual or accidental or unintentional or that the agents or servants in question were not acting in the course of their employment.

But, with respect, the principles enunciated by Lord Nolan in *Re Supply of Ready Mixed Concrete (No: 2)* were of general application in England as it was based on the Restrictive Trade Practices Act 1976 and it cannot be applied, lock stock and barrel, in Malaysia as there is no corresponding statute of that nature. An extract of *"Criminal Law"*, 6th edn, by JC Smith and Brian Hogan at pp. 163 and 164 distinguished strict liability with that of vicarious liability. This was what the learned authors said:

> Vicarious liability is by no means the same thing as strict liability. The point requires emphasis for there is an unhappy judicial tendency to confuse the two concepts. A statute may require *mens rea* and yet impose vicarious responsibility.

and they continued as follows at the same page:

> Conversely, it is clearly possible for a statute to create strict liability without imposing vicarious responsibility. Once a statute has been held to impose a duty, with strict liability, on a particular person, it is likely to be held that that person is liable for the acts of anyone through whom he performs that duty.

and further down the same page spilling over to p. 164, they had this to say:

> As in the case of strict liability, so with vicarious liability it may well be argued that the development is the work of the courts rather than of Parliament. A statute rarely says in terms that one person is to be liable for another's crimes.

> It is not uncommon, however, for the courts to detect such an intention in statutes which create summary offences. The reason most commonly advanced by the judges for holding a master liable is that the statute would be 'rendered nugatory' – and the will of Parliament thereby defeated – if he were not. Two quite distinct principles, differing somewhat in their effect, underlie the various decisions. In the first place, a person may be held liable for the acts of another where he has delegated to that other the performance of certain duties cast on him by Act of Parliament. In the second place, a master may be held liable because acts which are done physically by the servant may, in law, be the master's acts. These two types of case require separate consideration.

From the above passages, it can be discerned that offences of strict liability are creatures of a statute. It is the courts that interpret certain Acts of Parliament as creating offences of strict liability. In the absence of any statutory provision, an offence at common law can never be classified as an offence of strict liability. Therefore, for offences at common law, a master is not vicariously liable for the acts of his servant. It would be wholly misconceived to say that a contempt of court is an offence of strict liability. The offence in *Re Supply of Ready Mixed Concrete (No: 2)* was one of strict liability. The Restrictive Trade Practices Act, 1976 created a strict liability offence and this meant that the master must be liable for the act of his servant. Lord Nolan in his speech in *Re Supply of Ready Mixed Concrete (No: 2)* made this abundantly clear. In the present case, there is no statutory provision creating an offence of strict liability which attributes to a master vicariously liable for the criminal act of his servant. In short, an employer is not vicariously liable for the criminal acts of his employee. The principle is this: that an employee is solely responsible for his own criminal acts. For these reasons, it would be correct to say that the issue of whether the master was or was not acting "in the course of employment" was irrelevant for the purpose of determining whether the defendant was guilty of the contempt committed by the master.

In regard to the meaning of the word "privy", I gratefully adopt the speech of Lord Denning MR in *Compania Maritima San Basilio SA v. The Oceanus Mutual Underwriting Association (Bermuda) Ltd, The Eurysthenes* [1976] 3 All ER 243 CA when his Lordship explained that a person was privy to something if "he knew beforehand and concurred in it being done", and if it was the wrongful act of an employee, the employer would be culpable if it was done "by his command or privity". This meant that for the defendant to be liable for the contempt committed by the master, the plaintiff must prove that the defendant knew beforehand of the master's intention to break arrest and that the defendant concurred in the act being done. And sad to say, the plaintiff failed to discharge that burden by adducing proof beyond reasonable doubt that the defendant was privy and knowingly assisted in the vessel

Normar Splendour breaking arrest. This was my judgment and I so hold accordingly.

Conclusion

The facts and circumstances of the present case did not warrant the grant of the orders sought by the plaintiff in encl. 41. The plaintiff had not discharged the burden of proving beyond reasonable doubt that the defendant had committed the contempt or were privy to it or assisted in its commission. The manner in which the contempt committed by the master of the vessel Normar Splendour ought to be purged would be entirely within my domain. A fine of RM2,150 should be imposed and should be paid by the defendant in order to purge the contempt of the master of the vessel Normar Splendour under prayer (4) of encl. 41. For the reasons adumbrated above, I dismissed prayers (1), (2)(a) and (2)(b), and (3) of encl. 41 with costs to be paid by the plaintiff to the defendant.